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STATE OF MICHIGAN

IN THE SUPREME COURT
(ON APPEAL FROM THE COURT OF APPEALS)

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellees,

v

ST. JOHN HOSPITAL SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,
Defendant-Appellant,

and

G. PHILLIP DOUGLASS,
Defendant-Appellee,

and

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL, et al
Defendants.
_____/

Michigan Supreme Court No.: 126980

Court of Appeals: No. 241801

St. Clair County: 01-1051-NH

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellees,

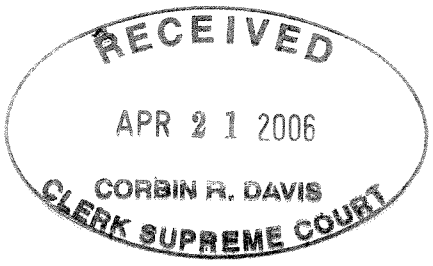
v

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,
Defendant-Appellee,
and

G. PHILLIP DOUGLASS,
Defendant-Appellant,
and

HENRY FORD HEALTH SYSTEM, d/b/a HENRY FORD HOSPITAL, et al
Defendants.
_____/

SC: 127032
COA: 241801
St. Clair CC: 01-1051-NH



BRIEF ON PLENARY APPEAL OF DEFENDANT-APPELLANT, DR. G. PHILLIP DOUGLASS, D.O.

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***** ORAL ARGUMENT REQUESTED*****

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BRIEF ON PLENARY APPEAL OF
DEFENDANT-APPELLANT, G. PHILLIP DOUGLASS, D.O.

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STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF BEING SOUGHT

On August 5, 2004, the Court of Appeals (MURRAY, PJ., and GAGE and FRANK KELLY, JJ.) denied a timely motion for reconsideration (Judge MURRAY would have granted the request for reconsideration) of its June 1, 2004 decision reversing (Judge MURRAY would have affirmed) the May 3, 2002 order of St. Clair Circuit Court Judge Daniel J. Kelly granting summary disposition to Defendant River District Hospital (5aa to 22aa).[1] The May 3, 2002 order dismissing the claims against River District Hospital (24aa) was predicated on the fact that on April 16, 2002, all parties had voluntarily entered into a written stipulation to dismiss Plaintiffs' claims against Defendant G. Phillip Douglass, D.O. with prejudice (25aa to 26aa). Because Plaintiffs' claims against River District Hospital were premised on the theory that it was vicariously liable for the acts of Dr. Douglass, and because a valid Order of dismissal as to an agent for tortious conduct operates by virtue of res judicata to bar recovery against the principal under a theory of vicarious liability, the trial court concluded that the operation of law precluded Plaintiffs from going forward against River District Hospital (79aa to 83aa; 84aa to 85aa).

In addition to reversing the trial court's May 3, 2002 order, the June 1, 2004 decision by the Court of Appeals' Majority also vacated the April 16, 2002 stipulation and order dismissing Dr. Douglass with prejudice (12aa). Appellant Dr. Douglass seeks a reversal of the judgment of the Court of Appeals and petitions the Supreme Court for reinstatement of the trial court's judgment. Alternatively, Dr. Douglass seeks a reversal of that portion of the Judgment of the Court of Appeals (12aa) which directed the trial court to vacate the April 16, 2002 stipulation and order dismissing him from this case with prejudice. This appeal now follows.

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[1] To differentiate itself from the Appendix of Appellant River District Hospital, the Appendix of Dr. Douglass is numbered "___aa" in its pagination.

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE 1995 AMENDMENT TO MCLA 600.2925d CALLS INTO QUESTION THE PRECEDENTIAL VIABILITY OF THEOPHELIS V LANSING GENERAL HOSPITAL, 430 MICH 473 (1988)?

Defendant-Appellant Douglass says: "No."

Plaintiffs-Appellees say: "Yes."

The Trial Court Said: "No."

The Court of Appeals said: "Yes."

II. WHETHER THE COURT OF APPEALS CLEARLY ERRED BY IGNORING THE RES JUDICATA IMPACT OF THE ORDER OF DISMISSAL WITH PREJUDICE AND BY NOT AFFIRMING THE STIPULATION AND ORDER OF VOLUNTARY DISMISSAL WITH PREJUDICE IN FAVOR OF DEFENDANT DR. DOUGLASS, AND BY INSTEAD ELECTING TO SET THAT ORDER ASIDE UNDER MCR 2.612?

Defendant-Appellant Douglass says: "Yes."

Plaintiffs-Appellees say: "No."

The Trial Court Said: "Yes."

The Court of Appeals said: "No."

III. WHETHER THE COURT OF APPEALS LACKED AUTHORITY TO ENTERTAIN AN APPEAL FROM A CONSENT JUDGMENT AND SHOULD NOT HAVE DIRECTED THE TRIAL COURT TO VACATE THE ORDER DISMISSING DR. DOUGLASS WITH PREJUDICE; WHETHER, IN ANY EVENT, THE DISMISSAL ORDER SHOULD NOT HAVE BEEN VACATED IN TOTO BY THE COURT OF APPEALS WITHOUT EVEN THE MINIMUM RELIEF OF REFORMING THE STIPULATION TO DISMISS WITH PREJUDICE INTO A COVENANT NOT TO EXECUTE?

Defendant-Appellant Douglass says: "Yes."

Plaintiffs-Appellees say: "No."

The Trial Court Said: "Yes."

The Court of Appeals said: "No."

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STATEMENT OF FACTS

Introduction. This is the Appeal on Leave Granted (1aa, 2aa, 3aa, 4aa) by Defendant G. Phillip Douglass, D.O. (hereinafter "Dr. Douglass") from the June 1, 2004 decision (Appendix A) (5aa to 22aa)[2] of the Court of Appeals (MURRAY, PJ., and GAGE and FRANK KELLY, JJ.) reversing the May 3, 2002 order of St. Clair Circuit Court Judge Daniel J. Kelly (24aa to 25aa), which had granted summary disposition to Defendant River District Hospital in this medical malpractice action brought by Plaintiffs Joseph Stamplis and Theodora Stamplis.[3] The May 3, 2002 order (24aa to 25aa) dismissing the claims against Co-Defendant St. John Hospital System d/b/a River District Hospital (hereinafter "River District Hospital") was predicated on the fact that on April 16, 2002, all parties had voluntarily entered into a written stipulation to dismiss Plaintiffs' claims against Dr. Douglass with prejudice (25aa to 26aa). Because Plaintiffs' claims against River District Hospital were premised on the theory that it was vicariously liable for the acts of Dr. Douglass, and because a valid release of an agent for tortious conduct operates to bar recovery against the principal under a theory of vicarious liability, the trial court concluded that the operation of law precluded Plaintiffs from going forward against River District Hospital (77aa to 85aa).[4]

In addition to reversing the trial court's May 3, 2002 order (24aa to 25aa), the June 1, 2004 decision of the Court of Appeals also completely vacated the April 16, 2002 voluntary stipulation and order dismissing Dr. Douglass with prejudice (12aa). On Dr. Douglass' Application to the Supreme Court, the Court ordered Oral Argument on the Application for December 15, 2005 (3aa

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[2] Dr. Douglass timely moved the Court of Appeals for reconsideration of its June 1, 2004 decision. The order denying reconsideration (Judge MURRAY, dissenting, would have granted) was entered on August 5, 2004. A copy of said order is included in (23aa).

[3] Theodora Stamplis brought a derivative claim for loss of consortium.

[4] Of significance here is the Trial Transcript for April 16, 2002 (27aa to 49aa) and the Trial Transcript for April 17, 2002 (50aa to 94aa).

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to 4aa) and, later, for plenary consideration (1aa to 2aa).

Background. Plaintiffs' Complaint alleging medical malpractice initially named seventeen Defendants. Three Defendants were hospitals, one was a family practice center, and the remaining thirteen Defendants were physicians. By the first day of trial (April 16, 2000), the only remaining Defendants were Dr. Douglass, River District Hospital, and Co-Defendant Henry Ford Hospital.

Plaintiffs' Complaint alleged, inter alia, that on January 29, 1997, about 9:30 AM, Plaintiff Joseph Stamplis went to River District Hospital and was seen by Dr. Douglass. In their Complaint, Plaintiffs further alleged (¶¶ 42-43, 75-80) that Dr. Douglass committed malpractice by purportedly failing to adequately examine, investigate and diagnose Plaintiff Joseph Stamplis with a spinal epidural abscess (103aa; 113aa to 116aa). Regarding River District Hospital, Plaintiffs claimed that it was vicariously liable for the negligent acts of its express, implied or ostensible agents (98aa to 102aa; 106aa; 35aa to 36aa).[5]

Prior to the commencement of proceedings, the Court conducted a settlement conference. On the record, the Court asked Jane P. Garrett, attorney for Dr. Douglass, for her position regarding settlement. Ms. Garrett stated:

> "[I] had some discussions with Mr. Kenney this morning, and for the first time there was a discussion of dismissal of Dr. Douglass without payment, and it is my understanding and belief we have confirmed in chambers already that we have agreed that Dr. Douglass, who has come up from Texas where he now resides for this trial, he will agree to remain here until he takes the stand to testify, which Mr. Kenney has assured will be sometime before the close of business on Friday; that Plaintiff will then be dismissed **with prejudice**, the individual claims against Dr. Douglass as a Defendant. This is why I will not be offering anything on his behalf." (35aa) [emphasis supplied].

Jeremiah Kenney, attorney for Plaintiffs, responded: "I intend to dismiss Dr. Douglass as a defendant and proceed against what I presumed to be his principal, the hospital. That's my

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[5] Likewise, the basis for Plaintiffs' claims against Co-Defendant Henry Ford Hospital was that it was vicariously liable for the acts of its agents (99aa to 101aa; 110aa).

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agreement." (35aa)

In order to specifically confirm Dr. Douglass' position with Plaintiffs' counsel, Ms. Garrett again reiterated that any dismissal as to him would be "**with prejudice**". (35aa) Jeremiah Kenney, attorney for Plaintiffs, agreed, and further stated he did not want to face dismissal of his claims against the hospital for the actions of Dr. Douglass. The Trial Court then stated: "I understand. I understand, I'm sure they do, too." (35aa to 36aa)

Having made an agreement to dismiss Dr. Douglas with prejudice, Counsel for Plaintiffs, however, plainly failed to obtain a prior written agreement from River District Hospital regarding the following required admissions or stipulations:

(1) That Dr. Douglass was its agent;

(2) That a dismissal with prejudice of Dr. Douglass would somehow permit Plaintiffs to continue to proceed against River District Hospital;

(3) That River District Hospital would acknowledge and assume legal responsibility for Dr. Douglass' actions despite his dismissal with prejudice from the lawsuit.

Further, the record reflects there was never any oral agreement between Plaintiffs and River District Hospital that preserved any claims against the Hospital, once the dismissal with prejudice of Dr. Douglass took place, as that Order of Dismissal With Prejudice (25aa to 26aa) was formally entered.

Later that day, Ms. Garrett presented the parties with a stipulation and order of dismissal with prejudice regarding Dr. Douglass (25aa to 26aa). Each and every attorney reviewed the stipulation and order and executed it without making any changes. Specifically, the stipulation and order of voluntary dismissal with prejudice regarding Dr. Douglass was signed by: Jeremiah Kenney, Esq., for Plaintiffs; Jane P. Garrett, Esq., for Dr. Douglass; Ralph Valitutti, Esq., for River

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District Hospital; and Bruce Shaw, Esq., for Co-Defendant, Henry Ford Hospital (25aa to 26aa).[6]

At the end of the first day of trial, and continuing the next day, River District Hospital, somewhat predictably, moved for summary disposition.[7] Relying on Brownridge v Michigan Mut Ins Co, 115 Mich App 745; 321 NW2d 798 (1982) and Limbach v Oakland County Rd Comm'rs, 226 Mich App 389; 573 NW2d 336 (1997), lv den 459 Mich 988; 593 NW2d 559 (1999), River District Hospital argued that the voluntary stipulation and order of dismissal with prejudice as to Dr. Douglass, was res judicata as to any claims of vicarious liability that could be brought against the Hospital (45aa to 47aa); (56aa to 58aa). Counsel for River District Hospital further informed the Court that at no time had he waived the Hospital's defense of agency nor did he ever stipulate that Dr. Douglass was an agent of the Hospital. (Id.) In addition, counsel for the Hospital pointed out that there was no agreement by the Hospital at any time to assume liability for the actions of Dr. Douglass (65aa to 67aa). On this basis, River District Hospital argued that Plaintiffs' reliance on the case of Larkin v Otsego Mem Hosp Ass'n, 207 Mich App 391; 525 NW2d 475 (1994) [to reform the order to a covenant not to sue as to Dr. Douglass] was misplaced (65aa to 67aa).

Plaintiffs' counsel countered by arguing that, pursuant to Larkin, supra, and under MCR 2.612, the order dismissing Dr. Douglass should be vacated and should be reformed to become a

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[6] At the time of trial, Dr. Douglass was represented by Jane P. Garrett, Esq. She represented him at the time Plaintiffs' attorney made the offer to stipulate to the dismissal with prejudice of Dr. Douglass. She also prepared the formal stipulation and order of dismissal with prejudice that was executed by all parties later that day. Subsequent to entry of the order, Co-Defendant River District Hospital informed the court that it had a motion for summary disposition. The court indicated that it would hold off on hearing the motion until after the jury was selected. Further discussion ensued and Plaintiffs' counsel asked if Dr. Douglass or Ms. Garrett, were leaving. Ms. Garrett stated: "Unless I'm asked to stay. Okay. I guess I'll make an oral appearance as co-counsel for River District Hospital then." At that time, River District Hospital designated Dr. Douglass as its corporate representative. (45aa to 47aa)

[7] On the first and second day of trial, there were discussions on the record regarding preliminary matters such as settlement, voir dire, etc. The jury was never impaneled and was dismissed when the Court ultimately granted River District Hospital's motion for summary disposition. (82aa to 93aa)

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covenant not to sue or a dismissal without prejudice (59aa to 62aa). Specifically, Plaintiffs' counsel argued under Larkin, as follows:

> **"If I had added the words that I added in this -- that I indicated on the record, that I did not dismiss the claims against the hospital for the actions of Dr. Douglass, I don't think there would be -- there would be any difference between that and the Larkin case.** . . . I think the Court can resolve this issue in the following way, and I think it doesn't undo anything that we've done already here today . . . We can have a decision on the merits of this case by merely indicating that this was a dismissal without prejudice. And I can indicate to the Court that I do not intend to -- this would act as nothing more than a covenant not to sue, a dismissal without prejudice **there's no intent on behalf of my client to reup against Dr. Douglass**. And I think that resolves all of the problems." (62aa to 63aa) [Emphasis supplied.]

Counsel for Dr. Douglass, Jane Garrett, responded and reminded the Court that the only agreement she ever had with Plaintiffs' counsel regarding Dr. Douglass was that any dismissal as to him would be "**with prejudice**". She stated:

> "What Mr. Kenney may have intended with regard to another Defendant is not part of our agreement. I did not have any authority or interest in making concessions on the part of another Defendant, what they would do, what their liability would be, what Mr. Kenney's case against them would be. My concern was with Dr. Douglass. The exchange was that he would be dismissed without payment if he continued to make himself available for testimony until Friday of this week.
>
> "The stipulation, including the language 'with prejudice' which was a crucial factor to my mind, was stated in chambers in the presence of the Court and all counsel. Plaintiffs agreed with the statement. The stipulation was restated on the record twice, I believe that it was with prejudice. A written stipulation and order was prepared over the lunch hour. It was presented to Mr. Kenney for review after we got back from lunch. He took it out to confer with his co-counsel. He signed the stipulation. The Court entered the Order. True copies were made and it was circulated to all counsel. I believe this issue is closed.
>
> "Now we are told that the stipulated order should be set aside and modified on the grounds of mistake, inadvertence, surprise or excusable neglect under MCR 2.612(c)(1)(a). I don't understand what the mistake, inadvertence, surprise or excusable neglect was. As far as I can tell, this seems to be an argument that Plaintiff was not clear on the legal effect of the stipulation like this. But I think that's fully Black-letter law that dismissal -- voluntary dismissal with prejudice acts as adjudication on the merits giving rise to res judicata. This is important to me as representing Dr. Douglass. The case has been decided as to him, and he is therefore protected from any further action." (69aa to 70aa)

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Counsel for Dr. Douglass further argued that, as a matter of law pursuant to Rzepka v Michael, 171 Mich App 748; 431 NW2d 441 (1988), and Haberkorn v Chrysler Corp, 210 Mich App 354; 533 NW2d 373 (1995), any misunderstanding by Plaintiffs' regarding the consequential **legal** effect of the stipulation and order of dismissal with prejudice regarding Dr. Douglass, was not grounds to reform the order; Ms. Garrett underscored the position of Dr. Douglass as follows:

> "Plaintiffs appear to be suggesting that the Court convert the order that we entered into expressly to a different agreement which we did not enter into. **I did not agree to a dismissal without prejudice.** Under those circumstances, Mr. Kenney, if the current trial does not turn out the way he likes, can turn around and sue Dr. Douglass again because the statute has a substantial period of time still to run, having been tolled during the pendency of this litigation. **I did not agree to a covenant not to sue.** That also has implications for further actions to be taken against my Defendant. **My objective was to extricate him from this suit finally and totally and that is the purpose of these orders with prejudice, to have some finality to the positions of the parties.**" (71aa) [Emphasis added.][8]

Ultimately, the trial court painstakingly walked Plaintiffs' counsel through the sequence of events that surrounded the stipulation and order of dismissal with prejudice regarding Dr. Douglass and Plaintiffs' failure to obtain a preliminary agreement from River District Hospital either on the record or in writing that they would be permitted to pursue their case against the Hospital upon the dismissal with prejudice of Dr. Douglass. That colloquy on the record is too lengthy to quote here but makes absolutely clear that Plaintiffs' Counsel engaged in fatal assumptions, culminating in a mistake of law which could not be set aside. (77aa to 80aa)

In granting Co-Defendant River District Hospital's motion for summary disposition under MCR 2.116(C)(7), the Court held:

> "The decision to dismiss Dr. Douglass with prejudice is res judicata as to any claim of vicarious liability against River District Hospital. The law is well settled on that point. Further, there is no credible evidence that the dismissal was understood

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[8] Counsel for Defendant Dr. Douglass reiterated that she never agreed to a covenant not to sue. In fact, she informed the Court that the subject never arose. Instead, the only offer by Plaintiffs' counsel was a dismissal with prejudice which was agreed to by Dr. Douglass (76aa).

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by the doctor to be merely a covenant not to sue. At the same time, the record is also very clear that counsel for Plaintiffs never intended to waive his right to proceed his vicarious liability claims against River District Hospital. Unfortunately for Plaintiffs, it has had that legal effect.

"**Silence in the face of Plaintiffs' counsel's declaration of intent does not amount to an agreement**. Attorneys for the Defendants owed their duty only to their clients. Further, I am of the opinion that the relief being sought under MCR 2.612 is not justified under the facts of this case. **Any mistake made is a mistake of law and not of fact**.

"Plaintiffs' counsel repeatedly acknowledged that the dismissal was to be with prejudice. No where did River District Hospital agree to waive its legal defense of res judicata. Additionally while subsection (C)(1)(f) offers broad leeway and extraordinary circumstances demand vacating orders to achieve justice, it has never been interpreted to be designed to relieve counsel of ill advised or careless decisions. Also, it is normally a provision that is only invoked and available where other remedies under that Court Rule are not provided. It is my preference that the case proceed and be decided on the merits, but I believe that the operation of law precludes that. The motion must be granted." (84aa to 85aa) [Emphasis supplied.]

On May 3, 2002, an order dismissing River District Hospital was entered (24aa). Although Co-Defendant Henry Ford Hospital had previously settled, a dismissal regarding that Defendant had not yet been entered.[9] As such, Plaintiffs attempted to have the trial court revise its order regarding Defendant Dr. Douglass and Co-Defendant River District Hospital. Plaintiffs argued that under MCR 2.612(C)(1), that after Dr. Douglass was dismissed with prejudice, his designation by Co-Defendant Hospital as its corporate representative, and his attorney's appearance as co-counsel for Co-Defendant River District Hospital, somehow "misled" the court (130aa to 131aa). The trial court apparently was not impressed with Plaintiffs' arguments and on May 16, 2002, the trial court denied Plaintiffs' motion (131aa). Subsequently, on May 28, 2002, Co-Defendant Henry Ford Hospital was dismissed by an order. When the orders regarding Dr. Douglass and River District Hospital thus became final, Plaintiffs appealed by right to the Court of Appeals.

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[9] On the second day of trial, Plaintiffs accepted the offer from Co-Defendant Henry Ford Hospital in the amount of $1,500,000.00 (86aa to 90aa).

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Proceedings in the Court of Appeals. In the Court of Appeals, Plaintiffs essentially argued that: (1) this case was like Larkin v Otsego Mem Hosp Ass'n[10] and that the stipulation and dismissal should be deemed or reformed to be a covenant not to sue; (2) Defendants conspired to perpetrate a fraud on the court; (3) Plaintiffs' unilateral mistake was voidable because they did not intend to bear the risk of such a mistake; and (4) Plaintiffs were entitled to relief under the Court of Appeals' "grand reservoir of equitable power." (Plaintiffs' Brief on Appeal to the Court of Appeals, filed December 27, 2002.)

In opposition, River District Hospital essentially argued that: (1) the only claims against River District Hospital were based on vicarious liability, and a dismissal with prejudice of the agent is res judicata as to the principal; (2) this case is not like Larkin because here counsel for the Hospital was not involved in the negotiations to release the physician and here there was no agreement in which the Hospital acknowledged and accepted continuing responsibility for vicarious liability for the dismissed physician, and that, in any event, Larkin was wrongly decided; and (3) there was no evidence of a conspiracy or fraud and Plaintiffs had not established mutual mistake or unconscionable advantage such that the trial court's decision not to grant relief under MCR 2.612 was an abuse of discretion. (River District Hospital's Brief on Appeal to the Court of Appeals, filed March 27, 2003.)

Finally, Dr. Douglass took the position on appeal that: (1) the Court of Appeals' review should not extend to the validity vel non of the April 16, 2002 dismissal of Dr. Douglass with prejudice inasmuch as, absent limited circumstances not present here, there is no appeal from a consent order, judgment or decree; (2) that the controlling legal principle is that "a release of the servant operates to release the master and vice versa if the claim is based on a respondeat superior

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[10] 207 Mich App 391; 525 NW2d 475 (1994) (See Justice Taylor's dissent).

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theory;"[11] (3) that the basis for the Larkin Court reaching a different result was a distinction not present here, i.e., in Larkin the stipulation specifically stated that, upon dismissal with prejudice of the physician, the hospital would acknowledge responsibility for the actions of the doctor and, that the doctor was its agent; and (4) the trial court had not abused its discretion in not setting aside the order dismissing Dr. Douglass with prejudice where (i) a unilateral mistaken understanding as to the legal effect of the order did not constitute the type of "mistake" justifying relief under that subrule, (ii) the record did not establish the elements of fraud or silent fraud, and (iii) there were no "extraordinary circumstances" present here as would warrant setting aside the order dismissing Dr. Douglass with prejudice on equitable grounds. (Dr. Douglass' Brief on Appeal to the Court of Appeals, filed March 28, 2003.)

On June 1, 2004, in a fractured one-to-one-to-one decision generating three separate opinions, the Court of Appeals reversed the trial court's order granting River District Hospital's motion for summary disposition and remanded the case "for entry of an order vacating the stipulation and order dismissing Dr. Douglass with prejudice", an Order which **also** affected Dr. Douglass (12aa). In the lead opinion, Judge Gage opined that, had the parties actually entered into an agreement analogous to the understanding memorialized by Plaintiffs' counsel, this case would have come under the ambit of Larkin. Although unwilling to broaden the scope of Larkin to cover this situation, Judge Gage nonetheless determined that Plaintiffs were entitled to relief from judgment, pursuant to MCR 2.612(C), concluding that adhering to the rule of law rather than what she viewed to be the spirit of the parties' agreement would be an injustice (9aa to 12aa). In her concurring opinion, Judge Kirsten Frank Kelly determined that the understanding of the stipulation articulated by Plaintiffs' counsel on the record must have reflected an off-record agreement to

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[11] Rzepka v Michael, 171 Mich App 748, 757; 431 NW2d 441 (1988).

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which all the Defendants consented (since they did not object) and that the written stipulation and order must have been the result of a "clerical error" [without specifying the error] that the trial court should have corrected (13aa to 15aa).

By contrast, Judge Murray began his dissent by noting that, under the well-settled law of this State, a stipulation to dismiss Dr. Douglass with prejudice clearly constituted an adjudication on the merits of Plaintiffs' causes of action against Dr. Douglass (16aa to 22aa). Further, because their claims against Dr. Douglass (the ostensible agent) had been resolved adversely to them, Plaintiffs could not now proceed against the principal, absent a prior agreement by River District Hospital that was either express (as in Boucher v Thomsen[12]) or implied (as in Larkin) (17aa to 19aa). Judge Murray then observed that silence by counsel for River District Hospital in the face of a declaration of intent by Plaintiffs' counsel did not amount to an agreement by River District Hospital, and therefore, there was no basis to infer a Boucher or Larkin type agreement to avoid the res judicata effects on a vicarious liability claim of an adverse adjudication on the merits of a claim against the agent (19aa to 20aa).

Judge Murray's dissent then went on to refute, seriatim, Plaintiffs' assertions that the trial court should have set aside the stipulated order of dismissal, pursuant to MCR 2.612(C) on the basis of fraud, mistake or equity. First, he found there was no fraud because no material facts were withheld from the court or the parties and the potential legal effects of a stipulation are not capable of being proved false, nor did Defendants have any legal duty to disclose the legal consequences to Plaintiffs' counsel and the record reflects that the stipulated dismissal discussions were initiated by Plaintiffs' counsel without input from counsel for River District Hospital (19aa to 20aa). Second, under controlling authority, MCR 2.612(C)(1)(a) does not permit relief from judgment based on a

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[12] 328 Mich 312; 43 NW2d 866 (1950).

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mistake of law inasmuch as it "was not 'designed to relieve counsel of ill-advised or careless decisions.'" (21aa). Likewise, a tactical error by Plaintiffs' counsel would not constitute "extraordinary circumstances" warranting relief from judgment on equitable grounds (21aa to 22aa).

On August 5, 2004, the Court of Appeals denied timely motions for reconsideration by both Dr. Douglass and by River District Hospital (23aa).

On July 8, 2005, the Supreme Court of Michigan set this matter down for oral argument on the question of the Application for Leave to Appeal; this oral argument took place on December 15, 2005 (3aa-4aa). On January 27, 2006, the Supreme Court of Michigan granted leave on plenary consideration in an Order of said date (1aa-2aa).

This appeal on plenary consideration in the Michigan Supreme Court now follows.

ARGUMENT

I. THE 1995 AMENDMENT TO MCLA 600.2925d DID NOT CALL INTO QUESTION THE VIABILITY OF THEOPHELIS V LANSING GENERAL HOSPITAL, 430 MICH 473 (1988) AS PRECEDENT.

The January 27, 2006 Order Granting Leave in this case (see 3aa-4aa) directed the parties to examine whether the 1995 amendment to the Contribution Act, specifically, MCLA 600.2925d, drew into question the precedential value of Theophelis v Lansing General Hospital, 430 Mich 473; 424 NW2d 478 (1988). To recapitulate briefly, Theophelis held, in part, that the then-current phrase of MCLA 600.2925d "one of two or more persons liable in tort" and "other tortfeasors" in MCLA 600.2925 justified the conclusion that the patient's release of an ostensible agent inexorably required the dismissal of the vicariously liable principal as there was no abrogation of the prevailing common law rule that the release of an agent of a vicariously liable principal operated to discharge the principal and that, in turn, releases so executed would not be reformed as covenants not to sue

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so as to avoid the rule of discharge. Theophelis, supra.[13]

Theophelis found two portions of MCLA 600.2925d as amended in 1974 [devolving out of the Uniform Laws Act recommended in 1955, updating the 1939 version] controlling. Those two phrases of central interest in MCLA 600.2925d in Theophelis, supra, were as follows:

> "When a release or a covenant not to sue or enforce judgment is given in good faith to 1 of 2 or more persons **liable in tort** for the same injury or the same wrongful death (a) it does not discharge any of the **other tortfeasors** from liability for the injury or wrongful death unless its terms so provide . . . ." (Emphasis Supplied.)

Importantly, Theophelis, in footnote 8, recognized a split in the jurisdictions as to whether a vicariously liable principal could even be deemed from the outset as a "tortfeasor"; the Supreme Court examined the cases and ultimately decided that, for a number of reasons, the vicariously liable principal ought to be considered as part of the "same share" as the active tortfeasor who actively committed the tort, thereby making the principal or master or owner or indemnitee or subrogee or surety liable vicariously, but still part of the unified share of those parties as one block.

While it is certainly true that Theophelis did, **in part**, agree that the statutory phrase "tortfeasor" in the Contribution Statute would not obviate the Common Law Rule extinguishing liability for the vicariously liable employer/master/principal counterpart, we believe that the "tortfeasor" thesis is **not** the only exonerating rationale found useful in the construction of the

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[13] The real culprit here is the case of Grewe v Mt Clemens General Hospital, 404 Mich 240; 273 NW2d 429 (1978) which is nearly thirty (30) years old. That case has consistently and routinely subjected innumerable medical defendants to vicarious liability or, as the agents, potential indemnification suits, based upon a long-outmoded fiction to do an injustice i.e., that physicians with "staff privileges" could generally be construed by a patient as direct employees of the hospital. Medical economics have long taught and impressed upon the public the independence of staff physicians and the distinctions between the hospital and physicians as non-employees. The realities have long consigned the Grewe rule to the dustbin of historical but egregiously wrong fictions, anomalies whose time ought to come and those which should come soon, for reexamination and overrulement: Really now, is there any competent, sentient patient in the American health care system who does not honestly know that their independent physicians with "staff privileges" to admit patients are not agents?

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Contribution statute as we read Theophelis. Because substantial portions of MCLA 600.2925a et seq were left untouched in 1995, we contend, the original exonerating rule still remains operative; furthermore, if the Legislature intended to address itself to Theophelis in 1995, it failed to do so efficaciously in that other pertinent portions of the statute in para materia justifying parallel exoneration were themselves never amended by the Legislature. Thus, because **other** important portions of the 1974 portions of the statute were left untouched in 1995, we conclude that the Legislature did not intend to, and did not, supersede Theophelis. Consider the following analysis.

Indemnity As Policy Support For The "Release Of All" Rule of Principal Exoneration

When this matter was argued orally before the Supreme Court on December 15, 2005, because of the extremely limited portion of fifteen (15) minutes to argue, undersigned counsel's sole point was that, if the Court did not ponder anything else in consideration of Theophelis, the Court should recognize footnote 13 of that Opinion as an additional supporting controlling rationale. This is so because the Legislature, most importantly, left the indemnity provision of MCLA 600.2925a(7) alone in 1995. As to whether there is continued value to Theophelis, as will be seen below, it makes enormous sense to implement the vertical parallelism between the release/dismissal with prejudice of the agent so as to vouchsafe the concomitant effect of also exonerating the principal to avoid useless and unfair satellite indemnification litigation; to do otherwise creates an endless, perpetual "circuity of action", an abiding indemnity liability which remains shockingly unfair if the agent were ordered dismissed or were released as to all liability claims in the first place by the injured party.

The Theophelis Michigan Supreme Court was certainly not wrong in identifying the injustice of later indemnity as a major concern, Contribution Act or no Contribution Act. Footnote 13 stated:

> **"Some courts have concluded that to hold a principal liable despite his agent's release would frustrate a second goal of the Contribution Act, i.e., the early and final settlement of claims. Because the Act preserves the right of indemnification, see §2925a(7), it is argued that such a result actually spawns**

litigation and leads to circuity of action. See 24 ALR 4th 547, 552, 567." (Emphasis Supplied.)

As noted by Theophelis itself, the possibility of later, unfair, destructive indemnity actions has been at least recognized by the then current line of cases led by Craven v Lawson, 534 SW2d 653 (Tenn 1976). While it can certainly be argued that the Michigan Legislature **attempted** to react to Theophelis when it changed MCLA 600.2925d by the deletion of the phrase "**liable in tort**" and when it substituted "**1 or more of the other persons**" for the preexisting phrase "**any of the other tortfeasors**", in failing to address the other co-extensive sections of the Contribution Act, the Legislature, simply and bluntly put, failed to eliminate the common-law policy recognized by Theophelis as to **other** components as to why the release-of-agent-releases-principal cases remain resolutely logical, above all else: It is grossly unfair to leave the agent, like Dr. Douglass, left hanging on a limb if the principal can always crush him or her, notwithstanding the decision of the plaintiff to dismiss the actively negligent party, to exonerate him from all claimed tort fault.

The statute must read as a whole, of course. Stowers v Wolodzko, 386 Mich 119; 191 NW2d 355 (1971). Individual words of a statute must not be construed in the void but must be read together to effectuate the intention of the Legislature. Dussia v Merman, 386 Mich 244; 191 NW2d 307 (1971). All parts of an act, including amendatory sections, should all be read together to harmonize the meaning and give effect to the legislation as a whole. Munro v Elk Rapids Schools, 385 Mich 618; 189 NW2d 224 (1971). It is the Court's duty to read the statute as a whole so that other portions of a statute, plainly worded, are not rendered inconsistent, meaningless or superfluous. Cafarelli v Yancy, 226 F3d 492 (6th Cir 2000).

The 1995 amendment was not passed without the Legislature's knowledge that other portions of the statute should be deemed to have properly interacted with it when it was to be construed after 1995: The Legislature is presumed to be familiar with the provisions of the statute which is being

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amended and the Legislature is presumed to understand that the new amendatory material will be integrated with existing material. In re Messer Trust, 457 Mich 371; 579 NW2d 73 (1998). Every word, every sentence and section must be read to be given existence and the entire act must be construed harmoniously and construed as a whole. Drouillard v Stroh Brewery Co, 449 Mich 293; 536 NW2d 530 (1995). What is to be avoided is the construction of a statute which would render any part of it mere surplusage or effectively meaningless. People v Borchard-Rouhland, 460 Mich 278; 597 NW2d 1 (1999); In re MCI Telecommunications Complaint, 460 Mich 396; 596 NW2d 164 (1999). Finally, to the extent that several provisions of a statute can be read to produce statutory inconsistencies, the conflicting provisions of the statute should be read together to produce a harmonious whole and so as to reconcile any inconsistencies whenever possible. World Book Inc v Dept of Treasury, 459 Mich 403; 590 NW2d 293 (1999).

Reading the legislation as a whole, the Legislature in 1995 finally did absolutely nothing to destroy or reduce the legal effect as to the inapposite nature of the Contribution Act if there is a right on the part of the principal to obtain indemnity from the tortiously active agent. In point of law, MCLA 600.2925a (7) continues to hold even as of today that identically said virtually from the time that the Uniform Laws were first recommended in 1939 in the Original Drafting Comments:

> **"This section [creating theb right of Contribution] does not impair any right of indemnity under existing law. Where 1 tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to [contribution] from the obligee for any portion of his indemnity obligation."** (Emphasis Supplied.)

Theophelis noted in footnotes 41 and 44 that, for principal/agent/master/servant suits such as this one, the very availability of indemnity displaces the Contribution Act by virtue of MCLA 600.2925a (7) in all of its forms so that the strictures of that statute do not even begin to govern these vicarious liability cases. The knowledgeable refusal of the Legislature in 1995 to amend MCLA 600.2925a (7) is of enormous consequence. A host of cases, infra, have recognized the Rule

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of Law that ordains that when there is a right of indemnity on the part of a vicariously liable defendant: **There is no right of contribution, and utterly no applicability of the Contribution Act**. This is in part because Contribution under the Act is but a partial reallocation of liability; where there is indemnity in a case of vicarious liability, however instead, there is a total and absolute right to receive complete reimbursement for all sums paid for the imputation of such vicarious liability from the active agent: In short, unbroken since 1939, there is no applicability of the Act in that vicarious relationship in the first place. MCLA 600.2925a (7).

Theophelis was certainly not wrong in footnote 13 in citing the leading case of Craven v Lawson, 534 SW2d 653 (Tenn 1976), or in further recognizing its impact in footnotes 41 and 44. Under the Uniform Contribution Act, the rule is clear as follows, held Craven:

> "**Where the right of full indemnity exists between persons liable in tort, no right of contribution exists. Where no right of contribution exists, the act does not purport to intrude. Thus, the section providing that a covenant not to sue discharges the covenantee from contribution and does not discharge any other tort-feasor, has no application to the master-servant principal-agent relationship where liability is solely derivative.**" (Emphasis Supplied.)

This legal effect is also strongly supported by the Commentary of the Commissioners to the Act which, in principle, relates to MCLA 600.2925a(7) by this guiding observation:

> "**It seems clear that there should be no contribution [in vicarious liability situations] where a master is vicariously liable for the tort of his servant, the servant has no possible claim to contribution from the master; and the master does not need contribution from the servant and will not seek it, since he is entitled to full indemnity**. The master, of course, may recover contribution from any third tort-feasor against whom he has no right of indemnity." (Emphasis Supplied.)

This Commentary from the drafters of the 1955 Uniform Contribution Among Tortfeasors Act led Craven (as it also did, correctly led the Theophelis Court) to conclude that the Uniform Contribution Act has no juridical applicability to vicarious liability situations in the first place. As Craven at 656 concluded, "[W]e have heretofore pointed out that the 1955 Act **makes it clear that**

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where the right of indemnity exists, the [Contribution] Act has no application." . . .

Recent cases have also validated this deep policy concern to extricate indemnification concerns from vicarious liability litigation in light of the Indemnification Displacement Provision of the Contribution Act. Consider Alvarez v New Haven Register, Inc, 735 A2d 306 (Conn 1999). In an automobile accident, a motorist who was injured and who was rear ended by an employee's vehicle nevertheless executed a release in the employee's favor and later brought suit against the employer claiming vicarious liability. Noting that the employer and the employee could not be joint tortfeasors covered by the statute as these two parties constituted "a single share" (see MCLA 600.2925b(b)), the Connecticut version of the Uniform Act was held not to apply in such vicarious liability claims. The Contribution Act was held not to be implicated to suspend the "release of one releases the other" rule. And, as here, the question in 1999 in the Connecticut court was whether the Legislature intended to abrogate the common law rule of extinction of claims in this regard.

While it is true that the "tortfeasor" language of the Uniform Act was still involved there, the Connecticut Court nevertheless concluded that indemnification concerns rendered the applicability of the Contribution Act unavailable. Looking to indemnification, the Connecticut Court stated that the "single share" concept rendered the release mutually extended to both parties as a defense:

> "Finally, we recognize the public policy established by the uniform act to encourage settlements. The plaintiff contends that an injured party will be reluctant to settle with and release the agent if to do so means that he has simultaneously extinguished his cause of action against the principal. **The agent, however, even after settlement with the injured party, would remain liable for indemnification to the principal.** . . . Therefore, contrary to the plaintiff's assertion the reality is that by reading §52-572e to permit an injured party to maintain an action under the doctrine respondeat superior against the principal, despite his release of the agent, **the Court would be discouraging settlements because the agent, would remain liable to indemnify the principal and would be disinclined to reach a settlement with the injured party. This scenario would be fully abortive of the intended release if it went no further than to protect the employee against a direct action by the injured party but afforded no protection against an [indemnification] action over by his employer. . . . Only if protected from further liability would the agent be likely to settle. Furthermore, we do not believe the Legislature**

intended such a circuitous procedure. . . .by holding that §52-572e does not apply to vicarious liability defendants [because of the circuity of action which will take place with indemnification] the release of the agent removes the only basis for imputing liability to the principal." (Emphasis supplied; citations omitted.)

Only by exonerating the principal is the agent truly protected from indemnification: It is the **agent's** active tort fault which triggers liability in the putative principal; only exoneration of **both** principal **and** agent renders the injured party's decision to exonerate the agent fully protective of the release of him or the dismissal with prejudice of her. The Connecticut Court has hammered home the essential problem here. If MCLA 600.2925d is construed to vitiate the release-of-agent-releases-principal rule called for by Plaintiffs here, then the agent will face the ruinous threat of indemnification by the principal over her shoulder. As such, she will be disinclined to settle the case at all, because it will do her no good as she will be dragged back into the case because of indemnification. Such indemnification considerations for Dr. Douglass would prove disastrous. As Dr. Douglass and the hospital constitute "one share" of the liability, without a final dismissal of the hospital, Dr. Douglass certainly stands potentially liable for indemnification, to be bankrupted at the whim of the hospital, and, in light of his acquittal voluntarily granted as to all tort fault by Plaintiffs, why should this be? Since all of the claimed allegations as to active tort fault are against Dr. Douglass' activities, and the hospital, being vicariously liable is alleged to have committed no active tort fault, to fail to apply the "release of one releases all" rule means that we are facing the ruination of indemnification when, speaking frankly, the exoneration of Dr. Douglass inexorably and necessarily implicates the parallel exoneration of the hospital who is sought to be vicariously liable under the odious Grewe doctrine.

Dr. Douglass and St. John Hospital are irrefutably "one share" for purposes of the Contribution Act, if it even applies. MCLA 600.2925b(b) makes it clear that the collective liability of both Dr. Douglass and the hospital shall constitute "a single share"; this should mean that they are

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not joint tortfeasors for purposes of the applicability of the Uniform Contribution Among Tortfeasors Act. Because the liability of St. John Hospital is wholly vicarious and cannot be based upon St. John's independent actionable fault, the release of the agent exonerates the agent for **all** of the tortious activity which is at issue in the case and necessarily precludes further recovery against the principal, here, St. John Hospital. See Mamalis v Atlas Van Lines, Inc, 560 A2d 1380 (Pa 1989).

The Mamalis Supreme Court of Pennsylvania held that the exoneration of the agent by a release was under the Uniform Contribution Among Tortfeasors Act wholly dispositive:

> "We hold that absent of any showing of an affirmative act, or a failure to act, when required to do so by the principal, termination of the claim against the agent extinguishes the derivative claim against the principal. **A claim of vicarious liability is inseparable from the claim against the agent since any cause of action is based upon the acts of only one tortfeasor**. There was no evidence introduced to establish acts of the principal that would make Atlas' liability anything other than vicarious. We find that the [Uniform Act] is inapplicable to the factual circumstances of this case." (Emphasis Supplied.)

In rejecting precisely the rationale advanced here, the Pennsylvania Supreme Court found that indemnity destroyed the availability of contribution or the applicability of the Act:

> "**More importantly, however, an agent cannot avoid liability in an indemnity action where, as here, the principal was not a party to the release.** Atlas has a right to indemnification against McClain as conceded by appellant. If a plaintiff agrees to indemnify the agent for any claim by the principal in a release, then the settling plaintiff can gain no more than what he received under the release--the settlement amount agreed to by the agent. **If a plaintiff does not agree to indemnify the agent against a claim by the principal, the agent will not be encouraged to settle because the principal may recover from him whatever amounts the plaintiff recovers from the principal.**" (Emphasis supplied.)

In short, indemnity is the key (a) as to why the "single share" portion of the Contribution Act does not apply to vicarious liability in the first place and (b) even if it did, the Contribution Act itself, MCLA 600.2925a(7), negates the existence of contribution: When the principal/agent, litigates the case as "one share", this means that the release and discharge of the agent should also

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inexorably neutralize any facts to be tried against the principal; if the case proceeds against the principal only, the principal unquestionably has the right of ruinous indemnity back against the agent; but this is fundamentally unfair because the agent has already been exonerated for the exact tortious conduct originally claimed but released and voluntarily discharged by the plaintiff. This is seen as an injustice if the Common Law Rule is abrogated; again, indemnity is the fulcrum.

It would be a ghastly injustice here if Dr. Douglass, having been exonerated from any tort liability and claims advanced by Plaintiffs by virtue of a dismissal with prejudice, would now be subject to ruinous later indemnification by St. John Hospital as this circuity would require Dr. Douglass to pay the Hospital for exactly that for which he was exonerated by the Stamplis family: The very alleged acts of malpractice which the Plaintiffs dismissed against him with prejudice.

Theophelis got this exactly right in footnote 13. Because the Legislature saw fit in 1995 not to touch the Indemnification Exception statute, MCLA 600.2925a (7), the Legislature may have tinkered with the Act in 1995 but it did not change the substance of the Common Law Rule. It is apparent that the inchoate right to indemnity in favor of St. John Hospital obliterates any contribution claim, indeed, whether the Act even applies, because the indemnity claim shifts the entire loss from the party who has been forced to pay to the party whose active tort fault causes him or her to properly bear the burden. Langley v Harris Corp, 413 Mich 592; 321 NW2d 662 (1982).

It remains a fact of litigation life that catastrophic indemnification suits against ostensible agents in medical malpractice cases are distinct and dire possibilities in satellite litigation against allegedly errant physicians. See the discussion in St Luke's Hospital v Giertz, 458 Mich 448; 581 NW2d 665 (1998) (recognizing the rule). Whenever the agent/employee/servant puts the principal/employer/master into a position of vicarious liability, the remedy of indemnity exists to protect the vicariously liable parties. Dale v Whiteman, 388 Mich 698; 202 NW2d 797 (1972).

This focus on indemnification liability is a central feature of many of the cases providing for

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the correlative release of a servant for a wrongful conduct acting as discharge for the release of the master for vicarious liability. One of the leading cases is Horejsi v Anderson, 353 NW2d 316 (ND 1984). The sole question in that appeal was whether or not the release of a servant also released the master in light of the Uniform Contribution Among Tortfeasors Act which had been passed in North Dakota. Noting from 24 ALR 4th 547 (1983), North Dakota held that most of the cases considering the matter, both in common law and under the Uniform Contribution Act, require a finding that the release of the agent inexorably releases the principal. Examining the Craven decision, cited in Theophelis, Horejsi joined the phalanx of states that holds that the Uniform Act does not even begin to apply at all to the derivative or vicarious liability of principals held vicariously liable for the torts of their agents. While noting the "tortfeasor" language which existed when Theophelis was decided, the North Dakota Supreme Court, however, went beyond the mere terms of the Uniform Act to discuss the requisite legal effect of the "single share" of liability referenced by the Uniform Act. Even more importantly for the North Dakota Supreme Court, the question of indemnity loomed large in the thinking of the Court in reenforcing the release-of-one-releases-all rule: As North Dakota stated:

> **"If we were to hold that the vicarious liability of John's parents was not discharged by the release, the end result may be that Brenda would be liable to them for indemnity**. A party is entitled to indemnity when he has only a derivative vicarious liability for damages caused by the one sought to be charged . . .Section 32-38-01(6) makes it clear that the Uniform Act does not affect the right of a master to [seek] indemnity from his servants:
>
> **"This chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution**, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation." (Emphasis Supplied.)

This holding is significant because, of course, it is based on a statute identical to MCLA 600.2925a (7). The North Dakota Supreme Court was disturbed at the idea that a settlement by the

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active tortfeasor could nevertheless result in the active tortfeasor-agent being dragged back into the case by the principal for purposes of establishing indemnification liability. Holding that this would militate against the policy in favor of settlements as such an agent would, in effect, receive no protection from the settlement agreement or the release and discharge, North Dakota adopted the Craven point of view, i.e., indemnity concerns support the global release of both principal and agent.

The Horejsi Court discussed the desirability of avoidance of circuity of action in such agent/indemnification cases as being an undesirable effect for public policy. Citing specifically the North Dakota version of the Uniform Act, word for word the same as MCLA 600.2925a (7), the North Dakota Supreme Court stated that it could not believe that its Legislature intended such a circuitous procedure and result by virtue of the "indemnity cycle" which would militate against settlements and bring endless later satellite litigation to the case, notwithstanding the exoneration from liability of the active tortfeasor.

Massachusetts agrees. In Kelly v Avon Tape Inc, 631 NE2d 1013 (Mass 1994) a respondeat superior claim was made and, as here, when the principal is otherwise liable but without fault, and its liability arises simply by operation of law between principal and agent, any general release given to an agent will preclude a subsequent action against the principal notwithstanding the Uniform Act, as the liability of the two are based on identical facts: The actions of the agent.

Again, as should be clearly held by the Michigan Supreme Court here, indemnification was held to be the key concern. The Massachusetts Court worried that the agent could be required to pay twice for the same tort, once to settle the case and the second time to fully indemnify the vicariously liable principal. In order to break this circle of liability, the Massachusetts Supreme Court found that the release of the agent effectively released the principal in order to break indemnified circuity.

This is precisely the rule and the policy in medical malpractice cases. In Anne Arundel Medical Center, Inc v Condon, 649 A2d 1189 (Md App 1994), a Grewe-style medical malpractice

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action related to a pathologist as purported agent of the hospital presented a very similar factual backdrop. As here, the Uniform Act was at issue as to whether or not the Legislature of Maryland had decided that the release of an agent discharges the principal from liability based upon the Act. The Anne Arundel case expressed difficulty as to whether the doctor and the hospital could be shown to be joint tortfeasors because they were "one share" liability defendants. The Maryland Court of Appeals stated that it was persuaded that "the better reasoned approach" was to hold that the Uniform Act does not include in its reach vicariously liable defendants and principals as joint tortfeasors; such parties should be seen as a single distributive share for liability purposes of the Act. That is to say, there would be no Contribution between them. Agreeing with Theophelis that the release of an agent removes the only juridical or factual basis for imputing liability to the principal, the Maryland Court believed that no other useful purpose would be served by a rule of law not recognizing the exoneration of the agent extending the exoneration of the principal.

Furthermore, because of the indemnification issue, the Maryland Court found that it was unlikely that any agent would ever be able to settle with the plaintiff if she still remained liable to indemnify her principal at a future date. Because indemnification liability remains open if the "release of all rule" does not obtain, under the Maryland version of the Uniform Contribution Act, which is identical to that of Michigan, the Court concluded that the Maryland Act did not prevent the operation of a release for the agent to be applied to benefit the principal also. For the policy reasons of encouraging settlement, the Maryland Court held:

> "If a plaintiff, under such a hypothetical legal scheme, were able to find an agent willing to settle, to allow the plaintiff then to proceed additionally against a vicariously liable principal would, in essence, permit the plaintiff 'two bites out of the apple'. **If the principal could then seek indemnity from the agent, the agent's earlier settlement would be of little solace to him. Such a double exposure would act as a disincentive for agents ever to agree to a settlement.**" (Emphasis Supplied.)

The Theophelis case cited with approval, Bristow v Griffitts Const Co, 488 NE2d 332 (Ill

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App 1986), which held that, because of the Uniform Act's primacy of the superiority of indemnification, the operation of a release for an agent should be deemed to destroy the liability against the principal as this would "...avoid circuity of action [in that] exoneration of the servant removes the foundation upon which to impute negligence to the master." As Bristow cogently said:

> "Section 2(c) was designed to encourage settlements. **Because we find an action for indemnity remains viable in cases involving vicarious liability, the employee in this case would gain nothing in return for his $20,000.00 and relinquishing his right to defend unless the covenant not to sue also extinguished the employer's vicarious liability. We, therefore, find a party whose liability is solely derivative, is not 'any of the other tortfeasors' within the meaning of §2(c).** Under Holcomb v Flavin, 216 NE2d 811 (Ill 1966), the covenant not to sue the employee discharged the employer's vicarious liability." (Emphasis Supplied.)

Given this policy stance, we think that Theophelis was correctly decided. In 2000, Williams v Vandeberg, 620 NW2d 187 (SD 2000) decided that, when a release contains an expressly worded reservation which attempts to exempt the principal specifically from its operation, but the claim is nevertheless factually or legally premised on the single act of the agent that causes vicarious liability to inure against the principal, the Uniform Act cannot and should not prohibit the release-of-one-releases-all rule. As with Theophelis (which was cited with approval by Williams), when the sole actions which caused liability in **anyone** are those of the active torts of the agent, the Court will then ignore such exemption language in the Release to dismiss the principal whose liability is exclusively posited on the exonerated agent, actions discharged against her in the first place.

For obvious policy reasons, this recognition of the satellite litigation problem is extremely important in "ostensible agency" medical malpractice cases such as the case at bar. In Biddle v Sartori Memorial Hospital, 518 NW2d 795 (Iowa 1994), there are two reasons why the release of the ostensible medical agent necessarily exonerates the principal: First, the "percentage of negligence" share attributable to the conduct of the servant necessarily, inexorably, includes the liability of the principal and this "single share" of liability, is vertically covered for both the principal and the

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agent; Secondly, as to the master and the servant, the only facts and liabilities at issue are always no more than the actions of the agent who has been exonerated, thereby leaving for dismissal the only just result for the principal whose liability is exclusively vicarious. The "circuity of indemnity action" and multiplicity of lawsuits reasoning of Horejsi, supra, as was repeated in Biddle, supra at 798-799, and as was thoroughly endorsed as valid by Williams, acting on behalf of the Supreme Court of South Dakota should persuade the Michigan Supreme Court of the correctness of this position.

In 2000, the South Dakota Court thoroughly endorsed Theophelis as the correct result.

Again, it was indemnity which was at the core of the policy concerns of the South Dakota Supreme Court. In footnote three of the Williams opinion the Court noted:

> "If we were to hold otherwise, then Williams may proceed against Willard and David in a subsequent suit and collect a judgment. Accordingly, Willard and David could then in turn sue Elmer for indemnity [citing Degen v Baymon, 200 NW2d 134 (SD 1972)]. In the suit brought by Willard and David against Elmer, Williams, according to the terms of the release would have to defend against Willard's and David's claims. **Such circuity of action and multiplicity of lawsuits can be readily avoided by implementing a rule where release to one is a release to all."** (Emphasis supplied.)

Finally, one of the most condemnatory decisions against abolition of the release of all rule based on the Uniform Act is found in Andrade v Johnson, 546 SE2d 665 (SC App 2001), rev'd on other grounds, 588 SE2d 588 (2003) citing, similarly, Nelson v Gillette, 571 NW2d 332, 339 (ND 1997). These cases excoriate the endless litigation circle of indemnification, a dilemma which thrusts the dismissed employee/agent back into a litigious cauldron of an Armageddon, despite his or her first-instance exoneration by virtue of a with prejudice termination, by the first-instance claimant. Condemning such satellite litigation as a "**corrosive circle of indemnity**", Andrande construed the Uniform Contribution Among Tortfeasors Act for South Carolina: Reading it as a whole, including with the indemnification exception as to vicarious liability plainly stated in the

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Comments, the South Carolina Court of Appeals expressed anxiety that the Uniform Act had been often misconstrued; this is so because, where there is the full right of indemnity between persons liable in tort, no right of contribution even exists in the first place, citing Craven v Lawson, 534 SW2d 653, 656 (Tenn 1976). Put another way, as has been found in Michigan, indemnity is the equitable right under which the entire loss is shifted from a tort-feasor who is only technically at fault to another who is primarily or actively responsible (see Langley v Harris Corp, 413 Mich 592; 321 NW2d 662 (1982)) on the difference between contribution and indemnity. Properly stated in Michigan, Contribution and the Contribution Act have no applicability in vicarious cases. Theophelis, footnotes 13, 41 and 44; MCLA 600.2925a(7).

Expressing concerns about the results of indemnification if South Carolina did not accept "the release of one is the release of all" rule, the South Carolina court in Andrande held:

> "In South Carolina, a master or principal only vicariously liable does not have an aliquot or proportion he or she ought to pay, **but rather may shift the entire loss to the servant or agent actively responsible, and may recover in full from the servant**. [Citations omitted.]
>
> "When Andrande issued a covenant not to sue in Johnson's favor, any claim she had against him were terminated. **Thus SCE&G's derivative liability based on Johnson's conduct was extinguished. Were we to find that the covenant released Johnson but not SCE&G, it would necessarily follow that SCE&G could seek indemnification from Johnson and recover the entire amount of any verdict against it from him. This would effectively strip the covenant not to sue of any real meaning and result in what Nelson v Gillette described as a 'corrosive circle of indemnity'." 571 NW2d 332, 339 (ND 1997).** (Citations and emphasis supplied in part.)

"Single Share" of Liability Revisited

The concern of Theophelis that MCLA 600.2925b(b) specifically exempted the vicarious liability situation from the applicability of the Uniform Act, has been validated time and time again, by "single share" cases like Williams, 620 NW2d 187 (SD 2000), supra. The Theophelis thesis, garnered from the Commissioner's Comments to Section 2 of the Uniform Act found at 12 ULA 87,

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frankly, posits a compelling rationale which cannot be denied. Because the agent and the principal who is vicariously liable constitute but a single liability share under MCLA 600.2925b(b), it makes no sense to utilize the Uniform Act to interfere with those relationships. When the case is purely vicarious, it would be grossly unfair to treat them differently, or as joint tortfeasors, when the Contribution Act cannot apply to them in any event because of the superior position of indemnity enjoyed by the principal specifically has displaced indemnity and the Act no longer applies. MCLA 600.2925a (7). But this, too, is not the only rationale to sustain the "release of all"rule.

As Theophelis notes, the Comments to the Uniform Act stated in no uncertain terms:

> "Second, it invokes the rule of equity which requires class liability, including the common liability arising from vicarious relationships, to be treated as a single share. For instance, the liability of a master and servant for the wrong of the servant should in fairness be treated as a single share. **For instance the liability of a principal and master for the wrong of the servant should in fairness be treated as a single share.**" (Emphasis supplied by the Court itself.)

As Theophelis cited from Horejsi v Anderson, 353 NW2d 316, 318 (ND 1984), when the plaintiff releases the servant he or she necessarily gives up the right to recover from the vicariously liable master and this is so because the "percentage of negligence" between the two parties represents but one "single share" of liability covered by the common liability of the master and the servant; as such, the master is necessarily released from vicarious liability for the released servant's misconduct.

To conclude, the Legislature did not amend, adjust or tinker with either the indemnity superiority of MCLA 600.2925a(7) or with the "single share" of liability of MCLA 600.2925b(b). Those provisions were held inviolate by the Legislature. We conclude with confidence that the Theophelis rule, as was stated plainly in the Opinion and in footnotes 13, 41 and 44 were left intact by the Legislature. Therefore, the "single share" principal/agent rule of release-of-one-releases-all remains the law in Michigan, especially matched with the concerns of many sister states recognizing

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the displacement of the Act when the vicariously liable principal holds rights of indemnity. Unabated, indemnity will interfere with settlements or, even worse, will engender endless satellite litigation.

For these reasons, we believe that the 1995 passage of attempted changes to the statute, MCLA 600.2925d, did not remove the wisdom of Theophelis as other portions of the Uniform Act as enacted in Michigan as they still remain viable to justify the "release-of-one-releases-all" rule of law.

II. THE COURT OF APPEALS CLEARLY ERRED BY NOT AFFIRMING THE RES JUDICATA EFFECT OF THE STIPULATION AND ORDER OF VOLUNTARY DISMISSAL WITH PREJUDICE IN FAVOR OF DEFENDANT DR. DOUGLASS, AND BY INSTEAD ELECTING TO SET THAT ORDER ASIDE UNDER MCR 2.612.

Standard of Review. A trial court's decision regarding a motion for relief from a judgment or order under MCR 2.612 is reviewed for an abuse of discretion. Haberkorn v Chrysler Corp, 210 Mich App 354, 387; 533 NW2d 373 (1995), citing Mikedis v Perfection Heat Treating Co, 180 Mich App 189; 446 NW2d 648 (1989). Further, although the trial court's grant of Co-Defendant River District Hospital's motion for summary disposition pursuant to MCR 2.116(C)(7), is reviewed on a de novo basis to determine whether the moving party is entitled to judgment as a matter of law, that standard is not relevant here as it does not concern **Dr. Douglass**. To the extent that the correctness of the trial court's decision on River District Hospital's motion for summary disposition turns on the correctness of the trial court's decision not to amend or set aside the stipulated order dismissing the causes of action against Dr. Douglass with prejudice, we continue to insist that the matter be reviewed for an abuse of discretion under that appellate standard, insofar as Dr. Douglass is concerned.

Discussion. The stipulation and order of dismissal regarding Dr. Douglass, entered into by Plaintiffs and Dr. Douglass (25aa to 26aa), was at all times understood by all parties to be **with**

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prejudice. The legal effect of this exculpatory ***Order*** is, therefore, res judicata between Plaintiffs and Dr. Douglass and all Plaintiffs' claims as to him should be forever barred, as agreed. Hence, the Court of Appeals clearly erred in granting Plaintiffs relief under MCR 2.612. Simply stated, Plaintiffs' unilateral mistake of law (or, put more candidly, their misunderstanding regarding the legal consequences) in dismissing Dr. Douglass with prejudice, which triggered the release of Co-Defendant River District Hospital, was a result not obtained by mutual mistake of fact, or fraud. Moreover, there are no extraordinary circumstances that warrant relief from the order. Further, such a unilateral mistake of law is not, contrary to the view of the concurring Court of Appeals Judge, Kirsten Frank Kelly, a "clerical mistake" within the meaning of MCR 2.612(A). Finally, although none of the four lower court judges who have considered this case have accepted Plaintiffs' argument that this case falls within the ambit of Larkin v Otsego Mem Hosp Ass'n, it is clear that Larkin (which should be circumscribed in a clearly worded opinion by this Court) does not apply to a case such as this where there has been no agreement (not even an implicit one) by the alleged principal to accept liability for the acts of the alleged agent and permit Plaintiffs to continue to proceed against the alleged principal in the face of a dismissal with prejudice of the agent.

A. There Was No Abuse of Discretion When the Trial Court Refused to Reform or Set Aside the Stipulation and Order of Dismissal with Prejudice Regarding Dr. Douglass under MCR 2.612(C).

The lead opinion of the Court of Appeals, written by Judge Gage, appears to have accepted Plaintiffs' reliance on MCR 2.612(C) as a basis for setting aside the stipulation and order of dismissal with prejudice regarding Dr. Douglass. In the Court of Appeals, Plaintiffs challenged the Order of Dismissal With Prejudice, asking that it either be set aside or be reformed into a covenant not to sue, despite its irrefutably voluntary and consensual nature. In this regard, under subsection MCR 2.612(C)(1)(a), Plaintiffs contended that a "mistake" was made, and under MCR 2.612(C)(1)(c), Plaintiffs alleged that a "fraud" was perpetrated on the Court, and under MCR

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2.612(C)(1)(f) Plaintiffs argued that "extraordinary circumstances" existed that required the Court of Appeals to vacate the lower court's order or reform the stipulation and order of dismissal.

However, as was astutely recognized by Judge Murray and, as well, by Judge Daniel Kelly, and as detailed below, Plaintiffs' error in miscalculating the **legal** effect that the stipulation and order of dismissal with prejudice would have regarding their claims of vicarious liability against River District Hospital is not a recognized ground for relief under MCR 2.612(C), and the trial court did not abuse its discretion in refusing to reform or vacate the Order. Further, regardless of whether the order granting summary disposition to River District Hospital is reversed, Dr. Douglass is entitled to insist upon a "with prejudice" dismissal **as to him** inasmuch as it was voluntarily entered into by all parties, with the express intention that such would occur, and that is what avoided and ended the trial. Finally, even if some Larkin-style "reform" is to be considered, it was pure error to set the dismissal with prejudice aside without protecting Dr. Douglass, in any event.

1. There Was No Mistake When The Parties Agreed to Stipulate to Dr. Douglass' Dismissal With Prejudice Prior to the Commencement of the Trial in this Matter.

In analyzing what constitutes a "mistake," the Courts of Michigan have held that relief can be granted only if the party seeking relief demonstrates that the mistake, misunderstanding or neglect was excusable and not due to the party's own carelessness. For instance, in Haberkorn, 210 Mich App 354, 382; 533 NW2d 373 (1995), the court found that a lawyer's legal misunderstanding of the meaning of "costs" contained within the mediation rule did not constitute the type of misunderstanding which would rise to the threshold of excusable neglect or constitute a mistake under MCR 2.612(C)(1), sufficient to form the basis for relief from the award of mediation sanctions. The Haberkorn court further found that the plaintiff's legal error in improperly assessing the consequences of their choice regarding the cost issue, was not the type of mistake sufficient to furnish the basis for relief under MCR 2.612(C)(1). Haberkorn, supra, 210 Mich App at 382.

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Similarly, in Limbach, 226 Mich App at 393; 572 NW2d at 336, the Court of Appeals found that while the plaintiff's agreement to dismiss a cross-claim with prejudice was a mistake because it was res judicata as to the plaintiff's claim against the defendant in the original, underlying action, it was not the type of mistake warranting reversal under MCR 2.116(C)(1)(a). In so finding, the Limbach court stated, "MCR 2.612(C)(a) is not designed to relieve counsel of ill-advised or careless decisions." Limbach, 226 Mich App at 393; 573 NW2d at 339, citing Lark v Detroit Edison Co, 99 Mich App 280; 297 NW2d 653 (1980).

Moreover, a unilateral mistake of law is not grounds for setting aside a consent order. As the court said in a decision highly similar to this case, Rzepka v Michael, 171 Mich App 748, 756; 431 NW2d 441 (1988), "if there was a mistake regarding the effect of the entry of a consent judgment, it was a unilateral mistake which did not justify setting aside the consent judgment." Indeed, a mistake of law is not usually grounds for relief absent inequitable conduct. Bomarko, Inc v Rapistan Corp, 207 Mich App 649; 525 NW2d 518 (1994).

The instant case falls squarely within the holdings of Limbach, Haberkorn, Rzepka, and Bomarko, supra. As in Limbach, supra, Plaintiffs in this case made a thoughtful **legal** decision to enter into the stipulation and order of dismissal with prejudice regarding Dr. Douglass, one that ended his defense of the trial. The dismissal of Dr. Douglass was a careful strategic choice as retaining the individual doctor shifts the sympathy factor away from the Plaintiffs to the defense.

To be sure, Plaintiffs may have erred when they failed to secure a prior agreement from River District Hospital that upon the dismissal of Defendant Dr. Douglass, the Hospital would acknowledge responsibility for his actions and acknowledge that he was their agent for purposes of the case and that the Hospital would agree to the continuance of the litigation against it. However, as in Haberkorn, Plaintiffs' misunderstanding and failure to properly assess the **legal** consequences of their choice, i.e. that the dismissal with prejudice of Dr. Douglass could, in turn, release River

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District Hospital by virtue of res judicata, is not the type of mistake sufficient to form the basis of relief under MCR 2.612(C)(1). Like Rzepka, supra, the mistake here is a unilateral one and does not justify setting aside the consent order, even if it has res judicata implications for another party. Finally, as in Bomarko, and as the trial court found below, any mistake of Plaintiffs in this matter was exclusively one of law, and was centrally not grounds to set aside the stipulation and order of dismissal regarding Dr. Douglass.

2. There Was No Fraud Perpetrated by Defendant Dr. Douglass, or the Parties When They Orally Entered into and Later Executed a Stipulation and Order of Dismissal with Prejudice Regarding Dr. Douglass.

Plaintiffs' allegations that "fraud" was perpetrated on the trial court are, simply put, outrageous in light of the fact that it was Plaintiffs' Counsel himself who offered to stipulate to the dismissal with prejudice of Dr. Douglass. Later, after the parties executed the stipulation and order of dismissal with prejudice regarding Dr. Douglass, neither counsel for River District Hospital nor counsel for Dr. Douglass agreed that it was their intent to agree to a covenant not to sue.[14] Plaintiffs argued to the Court of Appeals that, pursuant to Groening v Opsata, 323 Mich 73, 83; 34 NW2d 560 (1948), the "silence" of Dr. Douglass and Co-Defendant Hospital about the legal effect of the stipulation amounted to "fraud" by the suppression of a material fact which purportedly created a false impression with the trial court. However, there was no fraud perpetrated on the court here because there was no material fact concealed from the court, nor was there ever any material misrepresentation made to the court.[15] Matley v Matley (On Remand), 242 Mich App 100, 101; 617

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[14] A covenant not to sue would protect Dr. Douglass' personal estate but would require him to remain in the litigation, with National Data Bank reporting problems.

[15] In the Court of Appeals, Plaintiffs cited to Groening, supra, for the idea that a fraud may be perpetrated by the suppression of a material fact. Plaintiffs' reliance on Groening was misplaced inasmuch as the Defendants in that case verbally concealed material facts from Plaintiff that were found to constitute misrepresentations.

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NW2d 718 (2000).

What Plaintiffs were really arguing to the Court of Appeals was that a "silent fraud" was allegedly perpetrated by the parties. In M&D, Inc v WB McConkey, 231 Mich App 22, 28-30; 585 NW2d 33 (1998), the Court explained that a careful analysis must be applied if "silent fraud" is alleged. The Court of Appeals stated:

> "A claim of 'silent fraud' requires that plaintiffs set forth a more complex set of truths. In Lorenzo v Miller, 206 Mich App 682, 684-685; 522 NW2d 724 (1994), this court gave the following explanation of the so-called 'silent fraud' doctrine:
>
> "A fraud arises from the suppression of a truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain the covenant where the truth has been suppressed with the intent to defraud. (Cites omitted.) Thus, the suppression of a material **fact**, which a party is in good faith duty bound to disclose, is equivalent to a false representation in the supporting action of fraud." [Emphasis supplied.]

In further clarifying the doctrine of "silent fraud", the Court, in M&D, Inc, found that in analyzing prior Supreme Court cases, for a plaintiff to plead a claim of "silent fraud" successfully, the plaintiff must show there that some type of representation of a material **fact** was false or misleading and that there was a legal or equitable duty of disclosure. M&D, Inc, 231 Mich App at 31.

In the instant case, Plaintiffs never offered (and Dr. Douglass never agreed) to enter into any other order or stipulation except one that expressly dismissed **him** with prejudice, totally ending the case as to him. That **fact** is not disputed. In addition, once Plaintiffs' counsel stated on the record that he was dismissing Dr. Douglass with prejudice but still wanted to proceed against River District Hospital, Plaintiffs' counsel never elected to obtain a specific, prior agreement from River District Hospital on the record that it was in accord with Plaintiffs on that point. Indeed, Plaintiffs failed to even obtain an agreement from River District Hospital that it was acknowledging responsibility for the actions of the now dismissed Doctor, or that Dr. Douglass was its agent. The foregoing

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problems are all the failure of Plaintiffs. They were not the failure of Dr. Douglass. There was no suppression of any material fact or misrepresentation of any kind, really, by Dr. Douglass. The only representation ever made by Dr. Douglass to the trial court was that he would agree to enter into an order of dismissal with prejudice. Period. Nothing else, at all. As such, there is no relief available to Plaintiffs under any alleged theory of fraud or misrepresentation under MCR 2.612(C)(1)(c).[16]

3. There Are No Equitable Circumstances That Justified The Court of Appeals in Vacating the Stipulation and Order to Dismiss With Prejudice Regarding Dr. Douglass, Nor is There Such an Equitable Basis for Reforming the Stipulation Into a Covenant Not to Sue.

Finally, Defendants would point out that MCR 2.612(C)(1)(f) does not provide a justification for what the Court of Appeals did in directing that the stipulation and order dismissing Dr. Douglass with prejudice be vacated. Likewise, that subrule does not support Plaintiffs' requested relief of reforming the stipulation and order dismissing Dr. Douglass with prejudice into a covenant not to sue. Simply put, there are no "extraordinary circumstances" present in this case that would warrant such a remedy. Indeed, there are no circumstances at all that warrant vacation or reformation of the order in this case. Why should Dr. Douglass be subjected to a vacation or reformation for the legal mistake solely on the part of Plaintiffs? Why should **he** be thrown back into the case?

As we have noted above, Theophelis v Lansing General Hospital, 430 Mich 473; 424 NW2d 478 (1988), should control this case: Not only is the burden on the Plaintiffs who resist the legal

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[16] In the Court of Appeals, Plaintiffs attempted to impute nefarious conduct on the part of Dr. Douglass' attorney, Jane Garrett, because after Dr. Douglass was dismissed with prejudice, she entered an appearance as co-counsel for River District Hospital for purposes of the trial, and Dr. Douglass was designated as the corporate representative for River District Hospital (35aa to 43aa). In truth, there was no improper conduct at all. Any ad hoc appearance by Dr. Douglass' attorney on behalf of River District Hospital after the stipulated order of dismissal with prejudice was orally agreed to and subsequently entered, does not excuse Plaintiffs' failure to secure either an oral or stipulated agreement from River District Hospital that it was waiving its defense of agency, or assuming liability for the actions of the now dismissed Doctor.

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effect however mistaken, but also, the legal effect of such a release--even if it contains express language to retain the liability of the principal--cannot be negated by Larkin-style reformation to save the case. Even worse, here, the obliteration of the rule of law to benefit the principal took on a Titanic-style Tsunami and caused the dismissal with prejudice to be set aside as to Dr. Douglass.

Theophelis, supra, requires that this Court reverse the Court of Appeals decision to vacate the stipulated order of dismissal, and likewise augurs against any attempt to reform the stipulation and the order of dismissal with prejudice as to Dr. Douglass. First, it is uncontroverted, that at all times, it was understood by both Plaintiffs' attorney, and counsel for Dr. Douglass, that the stipulation and order of dismissal regarding Dr. Douglass was with prejudice (35aa to 36aa; 69aa to 70aa; 77aa to 80aa). The oral agreement of the parties, and the written stipulation and order of dismissal executed by the parties were both clear and unambiguous. Both sides expressly dismissed Dr. Douglass **with prejudice**. (Id.)

Furthermore, there is no dispute but that Plaintiffs never offered Dr. Douglass a covenant not to sue or voluntary dismissal without prejudice before the controversy unfolded, nor did Dr. Douglass ever intend to accept these less protective measures (69aa to 71aa). Thus, this case is an even stronger one than Theophelis where the court declined to reform a release to a covenant not to sue even though the release contained language preserving plaintiffs' claims against the hospital.[17] Unlike Theophelis, in this case, there is no agreement, either oral or written, that preserved any claim whatsoever against Co-Defendant Hospital. What was offered by Plaintiffs and accepted by Dr. Douglass was, at all times, a stipulation and order of dismissal with prejudice, no more, no less. As such, this Court should reverse the Court of Appeals' lawlessly sympathetic attempt to reform the Order.

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[17] Under Theophelis, Plaintiffs' counsel's exempting statements would be insufficient to be grounds to reform the absolute dismissal of Dr. Douglass to a mere covenant not to sue.

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Second, Plaintiffs have in any event not shown by clear and convincing evidence as required by Theophelis, supra, that there was a "mutual mistake," or "fraud" involving Dr. Douglass that would warrant reformation of the stipulated order that the parties entered into. As noted elsewhere, the only mistake in this matter, the only one, was **Plaintiffs**' unilateral mistake of **law**, not one of **fact**, in not understanding that the stipulation and order of dismissal with prejudice regarding Dr. Douglass may result in the release of River District Hospital in its **legal** effect. Under Theophelis, supra, Plaintiffs' inability to show that there was a mutual factual mistake of the parties, or fraud, or that the stipulation and order of dismissal with prejudice was not what was intended by Dr. Douglass and Plaintiffs', mandates that the Order not be vacated or reformed by courts.

Finally, and as apparently accepted by Judge Gage below, Plaintiffs argued to the Court of Appeals that it should, under MCR 2.612(C)(1)(f) and Heugel v Heugel, 237 Mich App 471, 481; 603 NW2d 121 (1999), set aside the judgment using its "grand reservoir of equitable powers" because of "extraordinary circumstances" that require such relief. According to Plaintiffs, the "extraordinary circumstances" in this case were the dismissal with prejudice of Dr. Douglass and the refusal of the trial court to convert the subject order to a covenant not to sue. (See Plaintiffs' Brief on Appeal to the Court of Appeals, p 23.)[18]

In McNeil v Caro Community Hosp, 167 Mich App 492; 423 NW2d 241 (1988), the Court set forth the following requirements that must be met for such relief under MCR 2.612(C)(1)(f):

1. The reason for setting aside the judgment must not fall under subrules (a)-(e);

2. The substantial rights of the opposing party must not be detrimentally affected; and

3. Extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice.

In McNeil, supra, the plaintiff filed a medical malpractice action. The defendants filed a

[18] Judge Gage's response (12aa) was to wipe out Dr. Douglass' dismissal with prejudice, in toto.

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motion for summary disposition and the court ordered the plaintiffs to file an amended complaint. When the amended complaint was filed, the defendants re-filed their motion for summary disposition. Again, the trial court ordered that the plaintiffs file a second amended complaint. The plaintiffs failed to do so and the case was dismissed with prejudice. Thereafter, the plaintiffs attempted to set aside the order of dismissal and reinstate the case under GCR 1963 528.3(6), the predecessor of MCR 2.612(C)(1)(f). The trial court granted the plaintiffs' relief. However, the Court of Appeals reversed the trial court. In addition to finding against the plaintiffs under the three-prong analysis set forth above, the McNeil court also said that the order of dismissal obtained in that case was not the result of improper conduct of the parties, but rather the fault of plaintiffs' own attorney, which did not amount to extraordinary circumstances requiring relief. McNeil, 423 NW2d at 241.

In this case, application of McNeil, supra, suggests that this Court should find the trial court did not abuse its discretion in refusing to vacate or reform the stipulation and order to dismiss Dr. Douglass with prejudice. Under the first prong of the McNeil analysis, Plaintiffs have attempted to set aside the stipulation and order of dismissal with prejudice regarding Dr. Douglass under MCR 2.612(C)(a) and (c) and have failed to show that any mutual mistakes of fact or fraud were involved in obtaining or executing the stipulation and order of dismissal of Dr. Douglass.

Second, the substantial rights of Dr. Douglass would be significantly and detrimentally affected should the order be set aside or even if reformed. If there is reformation, for him, there would be no end to litigation previously agreed upon to be completely at an end. Dr. Douglass never consented to a covenant not to sue nor did he agree to a voluntary dismissal without prejudice which could result in his being dragged back into this case, as is now what has happened. Both Plaintiffs' counsel and counsel for Dr. Douglass were explicit that any dismissal as to him would be with prejudice. Further, Ms. Garrett, counsel for Dr. Douglass, explained to the court that she did not

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want to leave any door open under a voluntary dismissal without prejudice as the statute of limitations had not run, having been tolled during the pendency of the lawsuit. She further informed the court that not only was a covenant not to sue never offered, she never would have considered it anyway, because only dismissal with prejudice is that vehicle that guaranteed her client a full and final adjudication on the merits (69aa to 71aa; 76aa to 80aa).

Finally, there are no "extraordinary circumstances" that warrant setting aside the judgment in this case in order to "achieve justice". There was, of course, utterly no improper conduct on the part of Dr. Douglass in accepting Plaintiffs' offer to be dismissed with prejudice to end the litigation for him for all time. Like McNeil, supra, and Limbach, infra, the fact that Plaintiffs' offer to stipulate to Dr. Douglass' dismissal with prejudice operated to release River District Hospital is a predicament arising out of a legal mistake made by Plaintiffs' counsel, and not in any way attributable to Dr. Douglass. Therefore, the Court of Appeals erred by vacating the order dismissing Plaintiffs' claims against Dr. Douglass with prejudice and Plaintiffs are not entitled to reformation of the order or any relief under MCR 2.612(C)(1)(f).

B. Plaintiffs' Reliance Below on Larkin v Otsego Mem Hosp was in Error, and This Court Should Reinstate the Orders Dismissing Dr. Douglass With Prejudice and Granting Summary Disposition to River District Hospital.

Although none of the four lower court judges who have considered this case appear to have accepted Plaintiffs' argument that this case falls within the ambit of Larkin v Otsego Memorial Hosp Assn, 207 Mich App 391; 525 NW2d 475 (1994), because Plaintiffs have placed such heavy reliance on their theory in that regard, it is anticipated that Plaintiffs will once again cleave to that position in opposition to this Appeal. Further, because an opinion from this Court clarifying the extent to which Larkin should be limited is one that is of significance to this State's jurisprudence[19] and one that, by

[19] See Larkin, supra at 396-401 (TAYLOR, J., dissenting).

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itself, is grant-worthy, this Brief will address the substance of that issue.

Plaintiffs' reliance on Larkin is misplaced. Indeed, Rzepka v Michael, 171 Mich App 748; 431 NW2d 441 (1988) is the case the Court of Appeals should have followed inasmuch as it controls the instant situation, we contend, and required that the Court of Appeals affirm the order dismissing Dr. Douglas with prejudice.

In Larkin, the plaintiff filed a claim of medical malpractice against a physician for failure to diagnose lung cancer and against Otsego Memorial Hospital based on claims of vicarious liability. Larkin applies, at most, only to cases of **established** agency placed on the record **before** the dismissal is entered:

> **"Following an admission by the hospital that there was an agency relationship between it and the doctor, the parties stipulated to the dismissal of the doctor with prejudice and without costs."** [Larkin, 207 Mich App at 392-393, 525 NW2d at 476 (emphasis added).]

The issue before the Larkin Court, was whether the stipulation and order of dismissal regarding the doctor, the admitted agent of the hospital, operated as a covenant not to sue the doctor, or whether it operated as a consent judgment or release, entitling the hospital, the principal, to dismissal as well. Larkin, 207 Mich App at 393; 525 NW2d at 476. The Larkin Court found that, although the stipulation and order to dismiss was a covenant not to sue the doctor only, and the issues between plaintiff and the dismissed doctor were res judicata, the dismissal did not relinquish the plaintiff's claim and extinguish the malpractice action by operating as a release of defendant hospital. Larkin, 207 Mich App at 396; 525 NW2d at 477.

In so finding, the Larkin Court recognized the long-held common law doctrine that release of an agent discharges the principal from vicarious liability. Larkin, 207 Mich App at 393; 525 NW2d at 476, citing Felsner v McDonald Rent-a-Car, Inc, 193 Mich App 565; 484 NW2d 408 (1992); Theophelis v Lansing General Hospital, 430 Mich 473; 424 NW2d 478 (1988); see, also,

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Rittenhouse v Erhart, 126 Mich App 674; 337 NW2d 626 (1983), aff'd in part and rev'd in part, 424 Mich 166; 380 NW2d 440 (1985); Drinkard v William J Pulte, Inc, 48 Mich App 67; 210 NW2d 137 (1973); Willis v Total Health Care, 125 Mich App 612; 337 NW2d 20 (1983).

The Larkin Court then carefully explained the nuanced distinctions between the use and significance of a "release" versus a "covenant not to sue". The Larkin Court stated:

> "A covenant not to sue is distinguishable from a release in that it is not a present abandonment or relinquishment of a right or claim but is merely an agreement not to sue with respect to an existing claim. It does not extinguish the cause of action. (Cites omitted).
>
> "As between the parties to the agreement not to sue, the final result is the same as if a release is given. The difference is primarily to the effect relative to third parties and is based mainly on the fact that in the case of a release there is an immediate discharge extinguishing the cause of action, whereas in the case of a covenant not to sue, there is only an agreement not to prosecute a suit." [Larkin, 207 Mich App at 393; 525 NW2d at 476.]

The Larkin Court found that contrary to Rzepka, supra, the plaintiff in Larkin did not enter into a judgment in favor of either party on the merits of the medical malpractice claim or on the basis of a settlement. Further, because the plaintiff in Larkin had not accepted a mediation award which has been determined to be equivalent to a consent judgment, the Court found that Felsner, supra, did not apply. The Larkin Court specifically stated, "we find no basis for the trial court's conclusion that the dismissal operated as a consent judgment." Larkin, 207 Mich App at 394; 525 NW2d 476.[20]

Based on Boucher v Thomsen, 328 Mich 312; 43 NW2d 866 (1950), the Larkin Court found that the stipulation and order to dismiss the doctor was a covenant not to sue and reversed the trial

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[20] The Larkin Court attempted to discredit the defendant's position that a voluntary dismissal can constitute a decision on the merits and operate as a release. We disagree with the majority: In so doing, the Larkin Court found that both In Re Koernke Estate, 169 Mich App 397, 425 NW2d 798 (1982) and Brownridge v Michigan Mut Ins Co, 115 Mich App 745, 848; 321 NW2d 798 (1982), were inapposite as they dealt with the issue of a voluntary dismissal and subsequent lawsuits filed by the same plaintiff against previously dismissed defendants.

court's grant of defendant hospital's motion for summary disposition under MCR 2.116(C)(7). The cornerstone of the Larkin Court's analysis was the fact that the stipulation specifically stated, that upon dismissal with prejudice of the doctor, the hospital would acknowledge responsibility for the actions of the doctor and, that the doctor was its agent. Specifically, the Larkin Court held:

> "In the case before us, the stipulation to dismiss did not reserve expressly plaintiff's claim against the hospital. **Nevertheless, it stated that the hospital was legally responsible for the actions of Dr. Kim and that his dismissal was based upon the hospital's acknowledgment that he was the hospital's agent for purposes of this case.** Nothing in that language suggests that by dismissing Dr. Kim the plaintiff intended to dismiss the hospital. Rather the implication is that the plaintiff recognized that the co-defendant hospital was the principal that could be held responsible for the negligent acts of the agent and they would proceed against the hospital on that basis after the dismissal of Dr. Kim." [Larkin, 207 Mich App at 396, 525 NW2d at 477 (emphasis added).]

Application of Larkin to the instant facts, we contend, requires that this Court give full effect to the stipulation and order of dismissal with prejudice regarding Defendant Dr. Douglass and dismiss him as agreed to by the parties. First, there is no dispute whatsoever, but that the **only** offer made by Plaintiffs to Dr. Douglass before dismissal was a stipulation and order of dismissal with prejudice, nothing more. The initial offer made by Plaintiffs and accepted by Dr. Douglass on the record was later incorporated into the stipulation and order of dismissal with prejudice executed by the parties on April 16, 2002. (25aa to 26aa)[21] As in Larkin, this Court must find that the stipulation and order of dismissal with prejudice reading Dr. Douglass, is res judicata between Plaintiffs and the Doctor (if not certainly the Hospital). That is, Plaintiffs are forever foreclosed in bringing any

[21] Dr. Douglass' attorney, Jane Garrett, was careful not to leave any door open regarding the complete finality of this litigation for Dr. Douglass. She told the Court that she never agreed to a voluntary dismissal without prejudice, because plaintiffs could come back and sue Dr. Douglass as the statute of limitations had not expired. Further, she recognized that entering into a covenant not to sue (which was never offered anyway), would leave the door open for the parties to seek indemnification, contribution, allegations of breach of contract or non-party at fault. Both Dr. Douglass' and Plaintiffs' counsel were always unequivocal that any dismissal as to him was **with prejudice** (35aa to 36aa; 69aa to 70aa; 77aa to 80aa).

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claims against Dr. Douglass; that was the **only** bargain struck. See also, Limbach, supra; and Brownridge, supra, where, under a broad reading of the rule of res judicata, the court found that a voluntary dismissal with prejudice acts as res judicata with respect to all claims raised in the first action and "every claim arising out of the same transaction with the parties, exercising reasonable diligence, might have brought forward at that time, but did not."

Second, Plaintiffs' claim under Larkin that the key to a court's analysis is the "intent" of Plaintiffs' counsel, is entirely erroneous. Larkin hinged its ratio decendae on the fact that the hospital in that case agreed, as a precondition, that it was "legally responsible" for the actions of the doctor, **as its agent**, and the dismissal was predicated upon the hospital acknowledging that the doctor was its **agent** for purposes of continuing the lawsuit. Similarly, the Boucher Court's analysis was also predicated on a written agreement that contained a specific covenant not to sue. In this case, unlike Larkin and Boucher, there was never **any** pre-existing agreement whatsoever between Co-Defendant River District Hospital and Plaintiffs that the Hospital was waiving its claim of an agency defense or that the Hospital was assuming responsibility for the actions of the dismissed physician, Dr. Douglass.

Furthermore, Plaintiffs' counsel went so far as to carefully review the proposed stipulation and order of dismissal regarding Dr. Douglass and adopted it without making any changes. Plaintiffs never bothered to obtain either an oral or written agreement from Dr. Douglass or Co-Defendant River District Hospital to enter into a covenant not to sue, or from the Hospital, a record statement on agency. This is, therefore, unlike Larkin or Boucher, where there was an unambiguous agreement of the parties to preserve claims regarding the hospital **before** dismissal. There was never any such agreement at anytime by either Dr. Douglass or Co-Defendant River District Hospital. As such, Larkin has no real applicability whatsoever to the instant facts and this Court should not revise the agreed-upon order of dismissal with prejudice regarding Dr. Douglass.

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We think that Rzepka completely controls here. Indeed, the Court of Appeals in Rzepka affirmed the decision of the trial court not to set aside the consent judgment based on plaintiff's argument that he did not realize the legal effect of entering into such a judgment. In so doing, the Court of Appeals relied on Schmalzriedt v Titsworth, 305 Mich 109; 9 NW2d 24 (1943); Sinka v McKinnon, 301 Mich 617; 4 NW2d 32 (1942); Burgess v Holloway Construction Co, 123 Mich App 505, 511; 332 NW2d 584 (1983), for the rule that a mistake as to the **legal** effect of a written instrument, deliberately entered into, intelligently executed and knowingly adopted, constitutes no grounds for relief in equity.

Mistakes of law have traditionally furnished utterly no grounds for reformation of a legal document nor does it create a vehicle by which a settlement or a consent order can be set aside. Equity does not favor setting aside arms-length legal bargains for allegedly "mistakes of law". Rzepka; Schmalzriedt; Sinka; Borgess. And see Haberkorn and Limbach, supra.

Application of Rzepka should clearly have required the Court of Appeals not to set aside the stipulation and order dismissing with prejudice Dr. Douglass. Here, as in Rzepka, Plaintiffs attorney offered and voluntarily entered into a stipulation and order of dismissal with prejudice regarding Dr. Douglass. Upon inquiry by the trial court, Plaintiffs' counsel admitted in this case that the only agreement he had ever secured was to dismiss Dr. Douglass with prejudice, nothing more. Further, Plaintiffs' counsel admitted, in effect, that he failed to obtain a previous agreement from River District Hospital that the doctor was its agent and that the Hospital would assume liability for the actions of Dr. Douglass despite his dismissal with prejudice from the lawsuit. (62aa to 63aa; 69aa to 70aa; 77aa to 80aa). Finally, Plaintiffs' counsel conceded that what he was dealing with was the **legal** (not factual) "effect" of offering and then executing the stipulation and order of dismissal with prejudice regarding Dr. Douglass and the resultant **legal** impact of the dismissal of claims of vicarious liability on the part of River District Hospital. (Id.)

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This matter falls squarely within the holding of Rzepka, we contend. In this case, the stipulation and order of dismissal with prejudice regarding Dr. Douglass operated exactly as the consent judgment operated in Rzepka. In both, the orders dismissed the party that gave rise to claims of vicarious liability on the part of the remaining defendant with prejudice and without costs or attorney fees. Like Rzepka, the stipulation and order of dismissal with prejudice regarding Dr. Douglass was deliberately executed and adopted by Plaintiffs' counsel. The fact that Plaintiffs' counsel engaged in a unilateral mistake of law and did not realize the **legal** effect the consent order would have, i.e, the release of River District Hospital, is fatal to Plaintiffs and not grounds to vacate or revise the order. Rzepka so holds. As such, this Court must give full force and effect to the stipulation and order of dismissal with prejudice regarding Dr. Douglass and affirm the trial court's decision to leave the order dismissing Dr. Douglass forever intact.

III. THE COURT OF APPEALS LACKED AUTHORITY TO ENTERTAIN AN APPEAL FROM A CONSENT JUDGMENT, SHOULD NOT HAVE DIRECTED THE TRIAL COURT TO VACATE THE ORDER DISMISSING DR. DOUGLASS WITH PREJUDICE, AND IN NO EVENT SHOULD THE DISMISSAL ORDER HAVE BEEN VACATED IN TOTO BY THE COURT OF APPEALS WITHOUT EVEN THE MINIMUM RELIEF OF REFORMING THE STIPULATION TO DISMISS WITH PREJUDICE INTO A COVENANT NOT TO EXECUTE.

Standard of Review. The scope of the jurisdiction of the Court of Appeals, and the authority of that Court to provide a particular remedy, are clearly questions of law. See, e.g., AFSCME v City of Detroit, 468 Mich 388, 397-398; 662 NW2d 695 (2003). This Court reviews questions of law de novo. Kelly v Builders Square, Inc, 465 Mich 29, 34; 632 NW2d 912 (2001).

Discussion. Simply put, the Court of Appeals did not have the jurisdiction, nor did it have a valid legal basis, for directing the trial court to vacate a consent order entered into by all of the parties.[22] If there is an arguable legal basis for setting aside the order granting summary disposition

[22] This issue was first raised by Dr. Douglass in a motion filed in the Court of Appeals to dismiss Plaintiffs' appeal. Subsequently, it was raised anew in Dr. Douglass' Brief on Appeal to the Court of

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to River District Hospital, short of vacating or amending in any manner the consent order dismissing Dr. Douglass with prejudice, and had the Court of Appeals availed itself of such an avenue in order to grant relief to Plaintiffs, then its relief would have at least been within its authority. However, here, where the stipulated order to dismiss Dr. Douglass with prejudice gives him no more than what was expressly agreed to between himself and Plaintiffs, it is unavailing for the Court of Appeals to confiscate from Dr. Douglass that to which he is clearly entitled merely because a third party (River District Hospital) may have coincidentally obtained a benefit at Plaintiffs' expense.

A. The Court of Appeals Lacked Authority to Entertain an Appeal from a Consent Judgment, Order or Decree and Should Not Have Directed the Trial Court to Vacate the Order Dismissing Dr. Douglass with Prejudice.

The order dismissing Dr. Douglas with prejudice simply states: "It is hereby ordered that this matter be dismissed as to G. Phillip Douglass, D.O., voluntarily with prejudice and without costs to any party." (25aa to 26aa). That stipulation and order of dismissal with prejudice in favor of Dr. Douglass was an order that was consented to with emphatic finality on the record by all parties. As such, the Order entered by voluntary consent is not subject to appellate challenge, and certainly should not have been subject to being vacated in order to remedy what the Court of Appeals viewed to be an inequity between two other parties.

A plethora of cases stand for the rule that a voluntary consent order will not be reviewed on appeal as a matter of appellate jurisdiction. Ahrenberg Mechanical Contracting, Inc v Howlett, 451 Mich 74; 545 NW2d 4 (1996); Trupski v Kanar, 366 Mich 603, 606; 115 NW2d 408 (1963); Sauer v Rhoades, 338 Mich 679; 62 NW2d 634 (1954). That is, when the parties have approved an order

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Appeals in order to give the decisional panel a chance to pass upon the appellate jurisdiction issue on plenary argument.

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and have consented to the judgment by stipulation, the resultant judgment or order is binding upon the parties and the court as having been voluntarily entered into, and it therefore should not be allowed to be appealed. Walker v Walker, 155 Mich App 405; 399 NW2d 541 (1986).

There are only a few exceptions that can result in the setting aside of a consent judgment. Two such exceptions are allegations of fraud and misrepresentation. However, neither equitable exception applies in this case. The instant record is replete with numerous statements by both Plaintiffs' counsel and counsel for Dr. Douglass, that they both fully understood that any dismissal as to Dr. Douglass would be wholly final and entered irrevocably with prejudice. (35aa to 36aa; 62aa to 63aa; 71aa; 77aa to 80aa) The actual stipulation and order executed by the parties was utterly unambiguous in its dismissal as it was with prejudice of Dr. Douglass. As such, any allegation of fraud or misrepresentation alleged on the part of Dr. Douglass is utterly without merit.

The real issue before this Court is the one which concerns the effects of Plaintiffs' failure to preserve their claims of vicarious liability regarding River District Hospital given the operative effect, as a matter of law, of the April 16, 2002 order dismissing Dr. Douglass with prejudice (25aa to 26aa). It was not until River District Hospital moved for summary disposition that Plaintiffs woke up and suddenly realized that they had not properly comprehended the full legal effect of their voluntary action, at which time they then attempted to set aside the stipulation and order of dismissal with prejudice regarding Dr. Douglass because of its legal effect of triggering the release of River District Hospital.

Unfortunately for Plaintiffs, the stipulation and order of dismissal with prejudice regarding Dr. Douglass, should be (and must be) deemed res judicata as to any and all claims between him and Plaintiffs. Larkin, supra; Limbach, supra; Haberkorn, supra. In this matter, the parties made a knowing and voluntary stipulation in connection with a consent order. Plaintiffs cannot suddenly change their minds when other, unforeseen legal consequences unfold by claiming fraud, mistake

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or inadvertence. The stipulation will be enforced and no appeal as to the consent order will be allowed to be heard. Mich Bell Tel Co v Sfat, 177 Mich App 506, 515; 442 NW2d 720 (1989); Wold v Jeep Corp, 141 Mich App 476; 367 NW2d 421 (1985); Christopher v Nelson, 50 Mich App 710, 712, 213 NW2d 867 (1973).

Finally, under Dora v Lesinski, 351 Mich 579; 88 NW2d 592 (1958), the Michigan Supreme Court said the following about this issue:

> "It is elementary that one cannot appeal from a consent judgment, order or decree [citing Capin v Perrin, 46 Mich 130; 8 NW2d 731, 722 (1881)] and also authorities and cases cited in Sauer v Rhoades, 338 Mich 679; 62 NW2d 634. As Justice Cooley said in the Capin case: 'But neither party can complain of a consent order, for the error in it, if there is any, is their own and not the error of the court.'"

Stare decisis as to the above authorities requires that this Court vacate the June 1, 2004 Judgment of the Court of Appeals, at least insofar as it directed the trial court to vacate the April 16, 2002 order dismissing Dr. Douglass from the action with prejudice. Plaintiffs cannot have ongoing, perpetual bites at the apple in this matter. Any error complained of by Plaintiffs in stipulating to the dismissal with prejudice of Dr. Douglass and the incidental **legal** consequence of releasing River District Hospital, is one of Plaintiffs' own making and not the error of Dr. Douglass or the trial court. As such, the stipulation and order of dismissal with prejudice should be given full force and effect and no appeal by Plaintiffs should result in overturning that April 16, 2002 order or otherwise affect Dr. Douglass' legal rights.

B. Whatever Equities Motivated the Court of Appeals to Provide Plaintiffs with Relief under the Circumstances, Those Equitable Considerations Could Not Have Been Sufficient to Provide Plaintiffs with More Relief than They Would Have Been Entitled to If They Could Establish Facts to Support a Larkin-type Reformation of the Stipulation to Dismiss into a Covenant Not to Execute on the Judgment.

Assuming arguendo–and we hotly deny it–that the Court of Appeals had the legal authority to provide Plaintiffs with relief from the consent order dismissing Dr. Douglass with prejudice, did

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the Court of Appeals have the authority to provide Plaintiffs' with more relief than they were seeking and more relief than they would have been able to obtain under Larkin? Dr. Douglass would note that the equitable considerations upon which the Court of Appeals relied in vacating the April 16, 2004 order dismissing him with prejudice could surely not be called upon to support denying him the lesser relief of reforming the stipulation to dismiss into a covenant not to sue on the judgment. Although, as argued throughout this appeal, a covenant not to execute on the judgment is not what Dr. Douglass and all parties agreed to at all, and it is not nearly as beneficial to Dr. Douglass as a dismissal with prejudice,[23] it is still a preferable option (from Dr. Douglass' perspective) than the approach chosen by the Court of Appeals, which was a gross and shocking appellate overreaching to simply **vacate** the stipulation and order of dismissal, thus returning Dr. Douglass to his status as a Defendant at risk of being assessed with liability for Plaintiffs' claims.

How can it be equitable that, after finding that Plaintiffs cannot establish sufficient facts to make out a case for Larkin-style reform, the Court of Appeals would nonetheless provide Plaintiffs with much, much more relief than to which Larkin would entitled them? It is well-settled in Michigan jurisprudence that a party who seeks equity must do equity. Attorney General v Thomas Solvent Co, 146 Mich App 55, 66; 380 NW2d 53 (1985). In this context, that means that equity cannot be used by Plaintiffs to overreach so as to obtain more than what is fair. See Royce v Duthler, 209 Mich App 682, 689; 531 NW2d 817 (1995) ("A person seeking equity should be barred from receiving equitable relief if there is any indication of overreaching"). Further, it has been long-settled that courts of this state should not exercise their equitable powers to do an

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[23] A covenant not to execute would be somewhat more analogous to a dismissal with prejudice if it were accompanied by an agreement that Plaintiffs would defend and hold Dr. Douglass harmless from a subsequent indemnity suit. Even then, Dr. Douglass' position would not be as secure, and he would still have to be put through subsequent litigation and all that it entails. Further, he may be subject to "data bank" reporting with regard to any judgment against him, regardless of whether Plaintiffs have agreed not to collect it.

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injustice or a wrong. Griffin v Johnson, 345 Mich 159; 75 NW2d 898 (1956). "The function of courts of equity is to do justice, not injustice." Fox v Jacobs, 289 Mich 619, 623; 286 NW 854, 856 (1939).

In the context of this case, these rules regarding an award of equitable relief mean that Plaintiffs should not be heard to ask, on equitable grounds, for vastly more relief than that required to relieve them of the unfairness of their circumstances, and the Court of Appeals should not be awarding an equitable remedy that goes beyond what is necessary to relieve Plaintiffs of the unfairness of their circumstances where doing so works an injustice on another.

Here, the Court of Appeals decision directed that the stipulation and order of dismissal in favor of Dr. Douglass should be wholly vacated (12aa), which is vastly in excess of all requested relief **ever** sought on appeal by Plaintiffs. At no time below, and not at any time during the course of this appeal, did Plaintiffs ever argue that the dismissal order in favor of Dr. Douglass should be set aside or construed anew so as to remove from its ambit the termination of this litigation as to Dr. Douglass. Throughout the lower court proceedings and on appeal, Plaintiffs maintained no more than that the dismissal of Dr. Douglass should have not have the legal effect of working a res judicata or principal/agent release in favor of Defendant River District Hospital. It was always acquiesced by Plaintiffs that Dr. Douglass would remain permanently out of the litigation, even if River District Hospital remained in the case, by virtue of the dismissal being construed as a covenant not to execute on judgment in the vein of Larkin v Otsego Mem Hosp Assoc, 207 Mich App 391; 525 NW2d 475 (1994). How can Dr. Douglass now obtain **less** than that Larkin-style result? Reversal of the Court of Appeals must follow to avoid injustice.

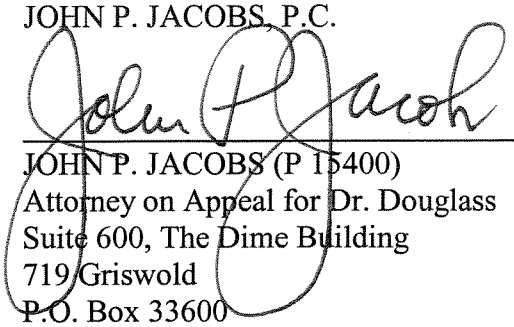
CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Defendant-Appellant G. Phillip Douglass prays that this Court **REVERSE** and **VACATE** the Judgment of the Court of Appeals and **REINSTATE** all actions of the trial court

in favor of Defendant Douglass' dismissal with prejudice, together with all costs of appeal.

Respectfully submitted,

JOHN P. JACOBS, P.C.



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STATE OF MICHIGAN

IN THE SUPREME COURT
(ON APPEAL FROM THE COURT OF APPEALS)

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellees,

v

ST. JOHN HOSPITAL SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,
Defendant-Appellant,

and

G. PHILLIP DOUGLASS,
Defendant-Appellee,

and

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL, et al
Defendants.
_____/

Michigan Supreme Court No.: 126980

Court of Appeals: No. 241801

St. Clair County: 01-1051-NH

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellees,

v

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL,
Defendant-Appellee,
and

G. PHILLIP DOUGLASS,
Defendant-Appellant,
and

HENRY FORD HEALTH SYSTEM, d/b/a HENRY FORD HOSPITAL, et al
Defendants.
_____/

SC: 127032
COA: 241801
St. Clair CC: 01-1051-NH

PROOF OF SERVICE

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STATE OF MICHIGAN)
)SS.
COUNTY OF WAYNE)

LYNN LASHER, being duly sworn, deposes and says that on the 21st day of April, 2006, she served **TWO COPIES** of the **BRIEF ON PLENARY APPEAL OF DEFENDANT-APPELLANT, DR. G. PHILLIP DOUGLASS, D.O., APPENDIX ON APPEAL** and this **PROOF OF SERVICE** upon the following:

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by placing said copy in an envelope correctly and plainly addressed to the above noted attorney, and depositing said envelope in the United States Mail with postage thereon fully prepaid.

Further Deponent sayeth naught.

LYNN LASHER

Subscribed and sworn to before me
this 21st day of April, 2006

DOLORES J. BADER, Notary Public
State of Michigan, County of Wayne
My Commission Expires: 07/10/2011
Acting in the County of Wayne

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